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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF WYOMING

ESTATE OF RUSSELL MONACO, BY AND THROUGH KATHY MONACO, WRONGFUL DEATH REPRESENTATIVE AND PERSONAL REPRESENTATIVE, AND KATHY MONACO, INDIVIDUALLY AND ON BEHALF OF MINOR CHILDREN,	**13-CV-151S**
Plaintiffs,	
vs.	
HARLEY G. MORRELL, PA-C, JOHN SCHNEIDER, JR., M.D., NORTHERN ROCKIES NEURO-SPINE, P.C., a Wyoming Corporation, AND JOHN DOES 1 THROUGH 10,	
Defendants.	

PLAINTIFFS' BRIEF IN SUPPORT OF MOTION FOR PARTIAL SUMMARY JUDGMENT

COME NOW Plaintiffs Estate of Russell Monaco, by and through Kathy Monaco, Wrongful Death Representative and Personal Representative, and Kathy Monaco, individually and on behalf of her minor children ("Plaintiffs"), by and through their undersigned counsel of record, Jon M. Moyers, Moyers Law P.C., and Fred Paoli, Bogue, Paoli & Thomas, LLC, and submit their brief in support of their motion for partial summary judgment against Defendants Harley Morrell, John H. Schneider, Jr., and Northern Rockies Neuro-Spine, P.C.

I. Statement of Undisputed Evidence

1. Russell Monaco was a patient of Dr. John H. Schneider, Jr. and Northern Rockies Neuro-Spine, and Harley Morrell was the "the physician assistant employed by Northern Rockies Neuro-Spine, and [Dr. Schneider] was his supervising physican." Exh. 1, Schneider Depo., p. 123. As Mr. Morrell's employer, Dr. Schneider "had the same rights and abilities to supervise, to discipline" him. *Id.*, p. 125.

2. In order for Mr. Morrell to practice in Wyoming, Dr. Schneider agreed to supervise him and to "be responsible for his medical acts." *Id.*, pp. 121-122. His supervision related to care provided to Mr. Monaco. Mr. Morrell was entitled to perform only those "duties and responsibilities delegated to him by his supervising physician" and then only "under the supervision of a licensed physician approved by the board." *Id.*, p. 122.

3. Mr. Morrell was permitted to prescribe medication only as "the agent" of Dr. Schneider. *Id.*, p. 124. "[T]he supervising physician is—has to supervise prescriptions that are administered by the physician assistant." *Id.* p. 124.

4. According to Dr. Schneider, "If a physician assistant is employed by a physician

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that it's incumbent on the physician to countersign orders and documents that have been primarly signed by the physician assistant." *Id.*, p. 126. "So Mr. Morrell was an employee of mine, and [West Park Hospital] would therefore not recognize his orders or documents as stand-alone documents; they would need to be countersigned by myself or actually one of the other supervising physicians if they were covering for me." *Id.*, p. 128-129.

5. Dr. Schneider had "statutory responsibility" for Mr. Morrell. *Id.*, p. 126-127. At the Board of Medicine trial, Dr. Schneider testified that he had "statutorily agreed to be responsible for all the medical acts of Mr. Morrell." *Id.* According to Dr. Schneider, it was his "overall responsibility to make sure that he provides for the safety of his patient," and that he needed to make sure that his "staff are adequately compliant with [his] directives and orders in order for [his] patients to be safe." *Id.*, p. 129.

6. In Plaintiffs' First Amended Complaint (Doc. 34), Plaintiffs alleged that Dr. Schneider was vicariously liable for the negligent actions of Mr. Morrell. *See* ¶ 47 of Plaintiffs' First Amended Complaint.

7. Due to Mr. Monaco's persistent low back pain, and the fact that Mrs. Monaco worked for Dr. Schneider, Dr. Schneider agreed to evaluate Mr. Monaco on November 28, 2011, while he was in Cody, Wyoming, thereby establishing a physician-patient relationship. At Dr. Schneider's direction, Mr. Monaco went to West Park Hospital where he was operated on by Dr. Schneider that same morning.

8. Mr. Monaco was scheduled for discharge the day after surgery, November 29, 2011. However, he was in extreme pain and did not meet the criteria for discharge because he

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was not independent and ambulating, he was nauseated, and he was possibly leaking spinal fluid. Exh. 2, Schneider trial testimony before the Wyoming Board of Medicine ("WBOM"), pp. 154, 157. Thereafter his pain escalated, and he was "literally up all night" in "severe pain." *Id.*, p. 155. On November 30, 2011, at approximately 8:00 a.m., Mr. Morrell ordered a five-day 50 mcg/hour Fentanyl Duragesic transdermal patch; Dr. Schneider countersigned this order. *Id.*, p. 160; Exh. 3, Physician's Orders. Mr. Morrell also ordered other narcotic medications for Mr. Monaco "multiple times" during his hospitalization: Dilaudid (Hydromophone), Phenergan, Vicodin (hydrocodone), Percocet (acetaminophen and oxycodone) and Demerol (meperidine); Dr. Schneider looked at the order and the mediations that were givien, and he signed the orders because they were "acceptable to me." *Id.*, pp. 160-164. "I did not discontinue them." *Id.*

9. The prescription of Fentanyl was contrary to the Federal Drug Administration black box instructions and warnings:

> Because serious or life-threatening hypoventilation could occur, DURAGESIC (Fentanyl Transdermal system) is contraindicated:
>
> - In patients who are not opioid tolerant
> - In the management of acute pain or in patients who require opioid analgesia for a short period of time
> - In the management of post-operative pain, including use after out-patient or day surgeries (e.g. tonsillectomies)
> - In the management of mild pain
> - In the management of intermittent pain (e.g., use on an as needed basis [prn]

Exh 4. This warning was the most severe warning issued by the FDA for prescription drugs, commonly referred to as a "black box" warning.

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10. Dr. Schneider was aware of the black box warning and knew Fentanyl "is not used for acute postoperative pain." Schneider depo., p. 166. In assessing whether a Fentanyl patch would be an "appropriate administrative delivery syststem for the continued use of narcotics in a particular patient," and for his "policies and procedures that related to narcotics generally or to Fentanyl," he was "reliant upon or did refer to the FDA warnings for that drug." *Id.*, p. 137. Mr. Morrell, on the other hand, was ignorant of the warning. Exh. 5, Morrell letter to Wyoming Medical Review Panel, ¶ 3 ("Should I have known about the black box warning with the Fentanyl patches; yes I should have, but at the time I was prescribing the medication I didn't. I do not feel I am a fault for the death of Mr. Monaco as I was following the direction of my supervising physican Dr. Schneider.").

11. Fentanyl and the other prescribed narcotics are well-established respiratory depressants individually and in combination:

> Q. Define what you mean by "respiratory depression?"
>
> A. It means that it decreases a person's drive to breathe.
>
> If you have a person that is breathing normally, but you put them on morphine, sometimes they may not be as responsive to low levels of oxygen, or higher levels of carbon dioxide in their system, which would stimulate them to increase their breathing.
>
> So, what it does, it slows down the breathing. Obviously it's interfering at the brain level with that drive to breathe and whatever is stimulating that.
>
> So, in my opinion, the combined effects of those three narcotics, (Fentanyl patch, Dilaudid and Oxycodone) with also the Valium added to it because of its central nervous system depression activities.
>
> Those are four significant drugs, powerful drugs that are slowing down the

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> central nervous system and ultimately decreasing his breathing to the point where it appears it just stops.

Exh. 6, deposition of Thomas Bennett, M.D. (the pathologist who performed Russell Monaco's autopsy) before Wyoming Board of Medicine at pp. 76-77.

12. Dr. Schneider understood that "narcotics will cause a respiratory depression," "which is what happened to Russ Monaco," and "why he died." Exh. 1, Schneider depo. p. 177. He also understood that Fentanyl "is a potent narcotic that has been quoted to be 80 to a hundred times more potent than the equivalent of morphine." Exh. 2, Schneider WBOM p. 71.

13. After Mr. Monaco was administered the Fentanyl patch, his oxygen saturation – the amount of oxygen in the blood – declined. Low oxygen saturation ("hypoxia") is a dangerous condition that places a person at major risk of heart failure and death. Dr. Schneider charted that Mr. Monaco's oxygen saturation dropped "into the 80s." Exh. 7, Schneider post-mortem discharge summary; Schneider WBOM p. 165. Dr. Schneider attriubuted this dangerously low oxygen saturation to the narcotic medication and that Mr. Monaco was showing "signs of intolerance of these multiple narcotics." *Id.*, p. 172. The nurses gave Mr. Monaco supplemental oxyen by nasal cannula to increase his saturation. *Id.*, p. 170.

14. On December 1, 2011, West Park staff recorded that Mr. Monaco had a 75% oxygen saturation, a dangerously low level. Exh. 8, Nurse Fulkerson called Dr. Schneider's office to advise him that Mr. Monaco was hypoixic. *Id.* In response, she was advised by Mr. Morrell to discharge Mr. Monaco "without home O2." *Id.* Dr. Schneider and Morrell signed Physician's Orders to "discharge home today." Exh.9, Physician's Orders.

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15. According to Dr. Schneider standing orders, patients with oxygen saturation below 85% must not be discharged but instead treated with supplemental oxygen and continual monitoring of their oxygen saturation. Exh. 10, Schneider Inpatient Standing Orders; Exh. 2, Schneider WBOM p. 171. Contrary to the standard, Mr. Monaco was discharged home without any oxygen supplement or monitoring.

16. Shortly before discharge, West Park Hospital injected Mr. Monaco with Phenergan and Demerol, other medications with respiratory depressive effects, at the direction and per the protocol of Dr. Schneider. Exh. 2, Schneider WBOM p. 219 ("That's acceptable. That was an order given by the provider.").

17. Mr. Morrell also prescribed homebound narcotic medication for Mr. Monaco, including: Dilaudid (hydromorphone), Percocet (acetaminophen and oxycodone), Valium (diazepam) and five more Fentanyl patches, 50 mcg/hr. Exh. 2, Schneider WBOM p. 197. This was the same medication Dr. Schneider had prescribed to Mr. Monaco during his hospitilzation. At the time of discharge, Mr. Monaco still had in place the Fentanyl patch. The record is also devoid of any discharge instructions by Dr. Schneider related to inherent risks of the Fentanyl patch or the other narcotics medications. Exh. 11, Physician Discharge Orders.

18. Mr. and Mrs. Monaco then returned to Billings, Montana. Exh. 12, Kathy Monaco depo., p. 141-142. During the trip, Mr. Monaco slept. *Id* at 142. Once in town, Mrs. Monaco filled the prescriptions at Target. *Id* at 145. She then gave two pain pills to Mr. Monaco around 2:30 p.m. *Id* 147-148. Later that evening, around 9:30, she placed two additional pain pills on the table for him. *Id* 151-152 . Mr. Monaco then went to sleep in a

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recliner and never woke up. *Id.* at 165. Around 6:30 am on December 2, 2011, Mrs. Monaco and her two young daughters found Mr. Monaco dead in the recliner just as they had left him. *Id* at 164. He was declared dead on December 2, 2012 at 7:28 a.m.

19. Autopsy was performed by Dr. Thomas Bennett, a board certified forensic pathologist. He confirmed that Mr. Monaco died from the prescribed medication and from no other medical condition.

> Mr. Monaco died as a result of his postoperative care, namely the overmedication he received. In my opinion, Mr. Monaco died as a direct result of the severe respiratory depression resulting from the combination of the many medications he received. These narcotics and benzodiazepines are central nervous system depressants, the narcotics especially have warnings of the risk of respiratory depression. He did not die from one of the medications, but rather as a result of the combined effects of all the medications on his body. From all appearances, Mr. Monaco took the pills exactly as prescribed.

Exh 13.

20. Dr. Schneider agreed that Mr. Monaco died from "mixed drug overdose" from the prescription drugs, casing "a cardiac dysrhythmia and sudden death." Exh. 1, Schneider depo. p. 171. At deposition, Dr. Schneider believed that Mr. Monaco's death was "preventable": "Had Mr. Monaco not received multiple narcotic medications above the calculated morphine equivalent dose that was safe for his age and status, then he would not have had a respiratory event." *Id.*, p. 178. Dr. Schneider believed that Mr. Monaco was "unstable" and in "critical condition," and should not have been discharged. *Id.*, p. 179. He also testified that the drugs prescribed upon discharge were not "appropriate." Exh. 2, Schneider WBOM, p. 197.

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21. Both Dr. Schneider and Mr. Morrell have admitted that the care provided to Mr. Monaco was substandard. In his April 1, 2014 affidavit filed in this case (Doc 60-3), Dr. Schneider was harshly critical of the care provided:

> A postoperative medical protocol, a copy of which is attached as Exhibit 1, does not allow for a prescription of Dilaudid and fentanyl at discharge. Monaco's use of postoperative oral medications in addition to fentanyl patch, other than a periodic Percocet for breakthrough pain, was against the medication protocol, and Morrell violated this protocol without my knowledge.
>
> ***
>
> Morrell disobeyed my standing orders, failed to follow my procedures and protocols in prescribing medications, acted outside the scope and bounds of his employment, and contravened my instructions in the treatment and care of Monaco.
>
> Morrell's care and management of Monaco directly violated the protocols that delineate appropriate medications for every NRNS patient at the time of discharge.
>
> On December 1, 2011, Morrell wrote out additional prescriptions for Dilaudid, Percocet, Valium and fentanyl patches, giving the prescriptions directly to Monaco and making no note in the orders or discharge paperwork regarding these additional medications.
>
> In addition to the continued transdermal fentanyl patch, the only other medication that Morrell ordered appearing in the medical records was a single Demerol/Phenergan injection at discharge.
>
> ***
>
> This direction by Morrell violated the medication protocol in force and practiced by all medical providers at NRNS.
>
> ***
>
> Morrell further violated standards of care and practice protocols by authorizing the discharge of a medically unstable patient following nursing communication to Morrell of a dangerous hypoxemia at 9 a.m. on December 1, 2011.

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> Morrell's failure to report this critical vital sign event to me confirms he was not acting as an agent, representative or employee of NRNS at the time of his care and management of patient Monaco.
>
> A NRNS protocol, a copy of which is attached as Exhibit 2, requires all patients at discharge to have oxygen saturation of greater than 90% or to be discharged home on supplemental oxygen.
>
> Morrell ignored the critical value of low oxygen vital signs and authorized the discharge of this patient.

Exh. 14, unverified affidavit of Dr. Schneider; *see* also Exh. 1, depo, p. 150. Dr. Schneider re-affirmed his affidavit on April 2, 2014 (Doc 61-1) Exh. 15, after Plaintiffs moved this Court for Dr. Schneider to verifiy his affidavit. *See* also Exh. 1, Schneider depo., p. 161.

22. In subsequent "tweets" Dr. Schneider wrote:

> Wyoming medical board actions were swift but evidence will show that communication failure from the PAC caused this death and not DR error.
>
> Tragic consequences of a patient death from prescriptions written by a rogue physician assistant employed by me resulted in license issues.

Exh. 16, John Schneider, M.D. March 27, 2012 tweets (emphasis added).[1]

23. In his sworn testimony before the Wyoming Board of Medicine, Dr. Schneider testified:

> Q. Have you learned from what's occurred with the Monaco situation anything?
>
> A. Well, I've - - I have learned many things. As I said yesterday, this is a - - this is a tragedy, and I'm responsible for the tragedy. Mr. Monaco's a patient of mine, on my service.

[1] Plaintiffs have asked Dr. Schneider to authenticate the tweets. We are awaiting his response.

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Exh. 2, Schneider WBOM, p. 262 (emphasis added). Dr. Schneider has admitted that he was the "doctor at the helm." *Id.*, p. 178.

> Q. Okay. And you agree that pursuant to Wyoming Statute 33-26-501(a)(v)(A), that you have statutorily agreed to be responsible for all of the medical acts of Mr. Morrell; isn't that correct?
>
> A. Correct.

Exh. 2, Schneider testimony at Board of Medicine hearing, p. 313.

24. Similarly, Mr. Morrell, in his Statement to the Wyoming Board of Medicine, the Wyoming Medical Review Panel, and in his Joint Application for Entry of Consent Judgment filed with this Court (Doc. 47), admitted that the care provided by Dr. Schneider and himself was substandard and negligent:

> Defendant Morrell admits and confesses liability on the allegations made against him by Plaintiffs in this matter, as alleged in the Complaint. Defendant Morrell admits and confesses that the allegations made by Plaintiffs are true and accurate.
>
> Defendant Morrell admits and confesses that his actions were with the express direction, review, verification, acknowledgement, approval, consent and signature of Defendants John H. Schneider, Jr., M.D., and Northern Rockies Neuro-Spine, in the ordinary course and scope of his employment by them.
>
> Defendant Morrell admits and confesses that Defendants Schneider, Northern Rockies Neuro-Spine, and West Park Hospital knew and approved the medication prescribed to Decedent Monaco during his hospitalization and upon discharge, were fully apprised of Decedent Monaco's oxygen desaturation, and knew and approved his discharge from the hospital on the prescribed medications without any oxygen monitoring, assistance or supplement.
>
> Defendant Morrell admits and confesses that the conduct alleged by Plaintiffs caused or contributed to cause the death of Decedent Monaco.
>
> Defendant Morrell admits and confesses that, on the advice of the Wyoming Board of Medicine, as a consequence of Decedent Monaco's death, Defendant

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Morrell left his employment.

Exh. 17.

25. On April 12, 2012, after Mr. Morrell agreed to the entry of a Consent Decree with the Wyoming Board of Medicine, his Wyoming Physician Assistant License (no. 298) was suspended. Exh 18.

26. On March 12, 2014, following its trial, the Wyoming Board of Medicine also revoked Dr. Schneider's licensure. In reaching its decision, the Board found:

> 418. The Board finds and concludes that Respondent practiced below that standard of care by prescribing the fentanyl patch in this case, or failing to countermand a prescription for the fentanyl patch entered by the physician assistant under his direct supervision.
>
> 419. The Board finds that Respondent practiced below the applicable standard of care by failing to properly assess Mr. [Monaco]'s hypoxia. The evidence presented established that: Mr. [Monaco] was morbidly obese; Mr. [Monaco] was prescribed high doses of multiple narcotic medications to allow mobilization; Mr. [Monaco]'s oxygen saturation s levels dropped to 80% or below on room air; and Respondent suspected that Mr. [Monaco] has sleep apnea.
>
> 420. The Board finds, that in the circumstances of this case, the applicable standard of care dictates that Mr. [Monaco] undergo inpatient pulmonology consultation and prompt reversal of the discharge order. Dr. Schwarz's expert medical opinion established the applicable standard of care for evaluating hypoxia and refuted the standard of care offered by Respondent. The Board finds that Respondent practiced below that standard of care by failing to properly assess Mr. [Monaco]'s hypoxia.

Exh. 19, Findings *of Fact, Conclusions of Law, and Order Revoking the Wyoming Medical License of John H. Schneider, Jr., M.D.* Wyoming Board of Medicine, March 12, 2014.

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II. Legal Discussion

A. Standard For Summary Judgment

Summary judgment is available if "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(a); *Scottsdale Ins. Co. v. National Union Fire Ins. Co. of Pittsburgh, PA*, --- Fed.Appx. ----, 2014 WL 4290558 (C.A.10, 2014). The purpose of summary judgment is "to isolate and dispose of factually unsupported claims or defenses." *Celotex v. Catrett*, 477 U.S. 317, 323-24, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). Summary judgment procedure "is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the rules of civil procedure as a whole, which are designed to secure the just, speedy and inexpensive determination of every action." *Id.* at 327.

In order to survive summary judgment, "[the nonmoving party] must go beyond the pleadings and designate specific facts so as to make a showing sufficient to establish the existence of an element essential to his case...." Fed.R.Civ.P. 56(c); *Cardoso v. Calbone,* 490 F.3d 1194, 1197 (10th Cir. 2007). The nonmovant must "do more than simply show that there is some metaphysical doubt as to the material facts." *Champagne Metals v. Ken–Mac Metals, Inc.,* 458 F.3d 1073, 1084 (10th Cir.2006). The relevant inquiry is "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Simpson v. Univ. of Colo. Boulder,* 500 F.3d 1170, 1179 (10th Cir.2007). Where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no genuine issue for trial. *Matsushita Elec.*

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Indus. Co. v. Zenith Radio, 475 U.S. 574, 587, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986); *Koessel v. Sublette County Sherriff's Dep't*, 7171F.3d 736 (10th Cir. 2013).

B. Defendant Morrell Has Admitted Liability

In his Joint Motion for Entry of Consent Judgment (doc. 47), Mr. Morrell admitted that he was at fault and moved this Court to enter judgment against him. Under the law, a party may properly confess judgment against himself. Fed.R.Civ.P. 68; *Crawford v. Infinitity Ins. Co.*, 64 Fed.Appx. 146, 2003 WL 1909286 (C.A.10 (Wyo.)); *see also Gainsco Ins. Co. v. Amoco Prod. Co.*, 53 P.3d 1051, 1059 (Wyo. 2002); *Howell Petroleum Corp. v. Samson Resources, Co.*, 903 F.2d 778 (10th Cir. 1990)("It is clear that a party 'prevail[s]' when the opponent confesses to a judgment ... Thus, a judgment by confession ... is a final determination that a plaintiff has prevailed on his claim."). Liability thus should be entered against Mr. Morrell in favor of Plaintiffs.

C. Defendant Schneider Is Legally Liable For the Negligent Acts of Defendant Morrell, His Physician Assistant and Employee

Under the Wyoming Medical Practice Act, W.S. 33-26-101 *et seq.*, a "physician's assistant" is any person approved by the Board "to assist in the practice of medicine under the supervision of a physician or group of physicians approved by the board to supervise such assistant." W.S. 1977 33-26-501. A "supervising physician" means "a board-approved physician who utilizes and agrees to be responsible for the medical acts of a board-approved physician assistant." *Id.* (emphasis added) "Supervision" means "the ready availability of the

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supervision of the supervising physician for consultation and direction of the activities of the physician assistant." *Id.* "Assists" means "the physician assists may perform those duties and responsibilities delegated to him by his supervising physician without the supervising physician being physically present." *Id.* In addition, according to the Act, "a physician assistant may prescribe medication only as an agent of the supervising physician." W.S. 33-26-510. A physician may be disciplined for failing to properly "supervise nonphysicians to whom the licensee has delegated medical responsibilities," "delegating responsibilities to a person who is not qualified by training, experience or licensee, " or "delegating medical responsibilities to a person who is unable to safely, skillfully and competently provide medical care to patients." W.S. 33-26-402(a)(xv, xvi, and xvii) (emphasis added); *see also* Exh. 1, Schneider depo., pp. 123 – 124.

Under the Wyoming Medical Practice Act, Dr. Schneider is responsible for the medical acts of Mr. Morrell. Dr. Schneider, as the supervising physician, assumed legal responsibility for the care provided by Mr. Morrell, as he admitted to the Wyoming Board of Mediciane. Specifically regarding the over-prescription of medication, Mr. Morrell acted as the legal "agent" of Dr. Schneider. The Board approved Mr. Morrell as a physician assistant based upon the assurance by Dr. Schneider that he would supervise and be legally responsible for Mr. Morrell's medical acts. *See* Wyo. Stat. Ann. § 33-26-501(a)(v); Exh. 1, Schneider depo. at pp. 126-27.

The purpose of the Medical Practice Act is to permit a physician assistant to practice medicine if his acts, as a nonphysician, are supervised by the superivising physician. Thus, as a

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matter of law, Dr. Schneider cannot now disclaim liability for the assistant to whom he delegated medical care. The medical acts by Mr. Morrell were part of the physician-relationship between Mr. Monaco and Dr. Schneider, and that care was integral to the medical acts to be supervised by Dr. Schneider. The prescription of Fentanyl and other narcotic drugs by Mr. Morrell was as Dr. Schneider's agent, which prescriptions were solely Dr. Schneider's responsibility to the patient. Indeed, Dr. Schneider countersigned the Physician's Orders relatd to discharge and Fentanyl, thereby indicating his consent with the actions of Mr. Morrell. As a matter of statutory liability, Dr. Schneider is liable for the acts of Mr. Morrell, which acts Dr. Schneider has sworn under oath were negligent and causative of Mr. Monaco's death.

Further, all of the care Mr. Morrell provided was during the course of scope of his employment by Dr. Schneider and Northern Rockies Neuro-Spine LLC. Mr. Morrell was insured through his employer for all of the medical acts he performed as a physician assistant. Under Wyoming law of respondeat superior, an employer is vicariously liable for the negligent actions performed by an employee during the course and scope of his employment. *Sharsmith v. Hill*, 964 P.2d 667 (Wyo. 1988)("Traditionally, a hospital can be held vicariously liable for the negligence of its employees"); *Parker v. Haller*, 751 P.2d 372 (Wyo. 1988). There is no dispute that Mr. Morrell's role was an an intermediate in the care of Mr. Monaco.

In *Sharsmith*, the Wyoming Supreme Court also adopted the doctrine of apparent agency in the medical care of patients and thereby expanded the liability of employers for the negligence of those medial partictioiners who are their ostensible or apparent agents. In that case, the Court held that a hospital may be liable even for the actions of an independent

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contractor where a patient believes that that care provider is associated with the hospital:

> Where a hospital holds itself out to the public as providing a given service, * * * and where the hospital enters into a contractual arrangement with one or more physicians to direct and provide the service, and where the patient engages the services of the hospital without regard to the identity of a particular physician and where as a matter of fact the patient is relying upon the hospital to deliver the desired health care and treatment, the doctrine of respondeat superior applies and the hospital is vicariously liable for damages proximately resulting from the neglect, if any, of such physicians.

Id., 764 P.2d at 672.

This same agency law applies to the relationship between Dr. Schneider and Mr. Morrell. Dr. Schneider contracted with Mr. Morrell to serve as his physician assistant. Mr. Morrell acted as the agent of Dr. Schneider in his dealings with Mr. Monaco and Powell Valley Hospital; Mr. Monaco chose Dr. Schneider – not Mr. Morrell – as his treating physician. Consequently, as a matter of law, Dr. Schneider is liable for the negligent acts of Mr. Morrell, his statutory and ostensible agent and employee.

D. Dr. Schneider is Independently Liabible For Mr. Monaco's Death

Separate from his vicarious liability, Dr. Schneider is liable for his own negligent care that resulted in Mr. Monaco's death. As Dr. Schneider admitted to the Wyoming Board of Medicine, he accepted responsibility for the "tragedy" because he was the physician in charge and the physician "at the helm." Mr. Monaco died on "his service." According to the undisputed evidence, Dr. Schneider was well aware of the "black box" warnings and the depressive effects of the narcotics but approved the prescription of medication and the discharge of Mr. Monaco without home oxygen or monitoring. Dr. Schneider countersigned

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the prescriptions and the Physican Orders directing discharge. Dr. Schneider knew that Mr. Monaco was experiencing "intolerance" for the narcotics. His actions were below the accepted standard of care, as deteremined by the Wyoming Board of Medicine, and the same result should be reached here. Summary judgment should be entered as a matter of law on this basis alone.

E. Dr. Schneider is Prohibited From Denying His Liability as a Matter of Law Based Upon the Wyoming Board of Medicine Findings

As a separate basis for summary judgment, Dr. Schneider is prevented from contesting his direct liability and his his vicarious liability for the negligent acts of Mr. Morrell, based on the findings in the Wyoming Board of Medicine's administrative proceeding that resulted in the loss of his medical license. The doctrines of collateral estoppel and res judicata apply to final determinations by administrative agencies. *University of Wyoming v. Gressley,* 978 P.2d 1146, 1153 (Wyo. 1999); *Slavens v. Board of County Commissioners for Uinta County,* 854 P.2d 683, 685 (Wyo. 1993). The doctrine of collateral estoppel precludes re-litigation of an issue identical to one previously determined in a prior proceeding; when the prior proceeding produced a decision on the merits of the issue; when the party against whom issue preclusion is asserted was a party in the prior proceeding; and when such party had a full and fair opportunity to litigate the issue in the prior proceeding. *Gressley,* 978 P.2d at 1153; *Slavens,* 854 P.2d at 686. Similarly, the application of res judicata is "long favored" to the determination of an administrative agency, when the agency "is acting in a judicial capacity and resolves disputed issues of fact properly before it which the parties had an adequate

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opporuntinty to litigate." *Slavens, supra*, 854 P.2d at 687 (quoting *United States v. Utah Constr. & Mining Co.*, 384 U.S. 394, 422, 86 S.ct. 1545, 1560, 16 L.Ed. 2d 642 (1966)).

All of the elements for collateral estoppel and res judicata are present here. Dr. Schneider lost his medical license due, upon the finding by the Board that he was negligent in the care and treatment of Mr. Monaco. This negligence included his culpability for the negligent medical acts of his assistant, Mr. Morrell. The issue presented to the Board is the same as the one here, there was a determination that Dr. Schneider was culpable for the negligent medical acts of Mr. Morrell and himself, Dr. Schneider was clearly a party to the prior proceeding, and Dr. Schneider was provided a full and fair opportunity to litigate the issue in the administrative proceeding. As a matter of law, under the theories of collateral estoppel and res judicata, this Court should hold that Dr. Schneider is liable for the admitted negligent medical acts.

F. Recent Controverting Testimony Of Dr. Schneider is Inconsequential to Plaintiffs' Motion for Partial Summary Judgment

For almost three years since Mr. Monaco's death, Dr. Schneider has blamed Mr. Morrell for the death of Mr. Monaco and labeled him "rogue." Plaintiffs thereafter sued Dr. Schneider and the hospital; Plaintiffs were able to reach a settlement with the hospital (Doc. 124). In a remarkable reversal of position to escape his vicarious liability in this case, Dr. Schneider is now attempting to disavow his sworn affidavits filed in this matter, as well as his two earlier "tweets." At his recent deposition, Dr. Schneider stated that he did not believe that the conduct of Mr. Morrell deviated from "the standards of care as a physician assistant." Exh. 1,

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Schneider depo, p. 148. This testimony is in direct contradiction to his prior sworn affidavits.

Under well established law, a nonmoving party may not manufacture a dispute of fact merely to defeat summary judgment by submitting testimony that impeaches his prior testimony. *See S.W.S. Erectors, Inc. v. Infax, Inc.,* 72 F.3d 489, 495 (5th Cir.1996) (citations omitted); *Thurman v. Sears, Roebuck & Co.,* 952 F.2d 128, 136 n. 23 (5th Cir.), *cert. denied,* 506 U.S. 845, 113 S.Ct. 136, 121 L.Ed.2d 89 (1992) (citations omitted); *Albertson v. T.J. Stevenson & Co., Inc.,* 749 F.2d 223, 228, 233 n. 9 (5th Cir.1984). Typically, this issue has been presented to the district court when a nomoving party submits an affidavit in conflict with his prior testimony to create a "genuine issue of material fact" to avoid summary judgment. *Albaugh Chemical Corp. v. Occidental Electrochemicals Corp.,* 3:87CV0953 G, 1993 WL 360730 at *3 (5th Cir. Aug. 23, 1993); *see Thurman v. Sears, Roebuck & Co.,* 952 F.2d 128, 137 (5th Cir.1992) (applying same principle); Doe v. Dallas Indep. School Dist., 220 F.3d 380, 2000 WL 1014682 (5th Cir. July 24, 2000). As one court observed

> If a party who has been examined at length on deposition could raise an issue of fact simply by submitting an affidavit contradicting his own prior testimony, this would greatly diminish the utility of summary judgment as a procedure for screening out sham issues of fact.

Perma Research and Dev. Co. v. Singer Co., 410 F.2d 572, 578 (2d Cir.1969) (citations omitted); *see also Camfield Tires, Inc. v. Michelin Tire Corp.,* 719 F.2d 1361, 1365-66 (8th Cir.1983).

In this case, Dr. Schneider is bound by his prior affidavits in this case. He has sworn to the negligence of Mr. Morrell, his agent and employee. Dr. Schneider's recent proclamation that Mr. Morrell was not negligent is an unashamed atttempt to aovid the legal consequences of

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his prior, sworn denouncements of Mr. Morrell. Under the legal authority, any effort by Dr. Schneider to "change his tune" should be dismissed by this Court in ruling on Plaintiffs' motion.

G. Conclusion

For each of the reasons stated herein, Plaintiffs pray this Court enter partial summary judgment in their favor and against Defendants Morrell, Dr. Schneider, and Northern Rockies Neuro Spine. Mr. Morrell has admitted negligence as pleaded by Plaintiffs. The negligence of Mr. Morrell is imputed to Dr. Schneider as a matter of law, under the doctrines of statutory liability, vicarious liability, and respondeat superior. This conclusion is mandated by the doctrines of collateral estoppels and res judicata.

DATED this 1st day of December 2014.

MOYERS LAW P.C.

By: /s/ Jon M. Moyers

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Wyo. State Bar #6-3661

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CERTIFICATE OF SERVICE

I hereby certify that on this 1st day of December, 2014, I electronically filed the foregoing with the Clerk of the Court using CM/ECF System which will send notification of such filing to the following:

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I hereby certify that I have mailed by United States Postal Service the document to the following non CM/ECF participants:
No manual recipients.

MOYERS LAW P.C.

By: /s/ Jon M. Moyers

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UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF WYOMING

ESTATE OF RUSSELL MONACO, BY AND THROUGH KATHY MONACO, WRONGFUL DEATH REPRESENTATIVE AND PERSONAL REPRESENTATIVE, AND KATHY MONACO, INDIVIDUALLY AND ON BEHALF OF MINOR CHILDREN,

Plaintiffs,

vs.

HARLEY G. MORRELL, PA-C, JOHN SCHNEIDER, JR., M.D., NORTHERN ROCKIES NEURO-SPINE, P.C., a Wyoming Corporation, WEST PARK HOSPITAL DISTRICT, WEST PARK HOSPITAL, QUORUM HEALTH RESOURCES, LLC, a Delaware Corporation, AND JOHN DOES 1 THROUGH 10,

Defendants.

13 CV-151S

VIDEOTAPED DEPOSITION OF JOHN SCHNEIDER, M.D.
Taken in behalf of Plaintiffs

9:15 a.m., Tuesday
October 21, 2014

PURSUANT TO NOTICE, the deposition of JOHN SCHNEIDER, M.D., was taken in accordance with the applicable Wyoming Rules of Civil Procedure at the United State Courthouse, Library, 111 South Wolcott, Casper, Wyoming, before Alexis Anderson, Court Reporter and Notary Public of the State of Wyoming.

ALEXIS ANDERSON
(307)262-3334

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Also Present: Jacek Bogucki

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ALEXIS ANDERSON
(307)262-3334

PROCEEDINGS

(Deposition proceedings commenced 9:15 a.m., October 21, 2014.)

VIDEOGRAPHER: Good morning. Today's October 21st, 2014. The time is approximately 9:15 a.m. Location is 111 South Wolcott, Casper, Wyoming, 82601. My name is Jacek Bogucki, video specialist of Legal Video of Wyoming, located at 1622 South Oak, Casper, Wyoming.

This is Case Number 13-CV-151-S, entitled Estate of Russell Monaco, et al., Plaintiffs, versus Harley G. Morrell, PA-C, et al., Defendants.

The witness is John Schneider, Junior, M.D. Video deposition is requested by attorneys for Plaintiff.

Counsel and all present will please identify themselves for the record.

MR. MOYERS: My name is John Moyers. I'm with Fred Paoli. We represent Plaintiffs in this case, the Monaco family.

MR. EMERY: My name is Steve Emery. I represent the Defendants in this case, and I'm here together with Ron Jurovich.

VIDEOGRAPHER: The witness may be sworn in, please.

JOHN SCHNEIDER, M.D.,

called for examination by the Plaintiffs, being first

PLAINTIFF'S EXHIBIT 1

tabbies

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cases that I used a physician assistant on, he was the assistant. There are other physician assistants that I might borrow from another person.

Q. Sure. And after Gantz was hired?

A. **Approximately two third, one-third split so two-thirds, Morrell; one-third, Gantz.**

Q. Was Mr. Morrell your primary P.A. at West Park Hospital?

A. **Again, can you clarify the time period?**

Q. Well, I don't know if you divided up Gantz and Morrell between what center you operated on?

A. **I didn't. I didn't. Gantz, once he joined -- once he was hired, he was credentialed at all the institutions that both Morrell and I were credentialed at.**

Q. Were you part of Morrell's application process with the state of Wyoming in order to be a physician's assistant?

A. **I would assume so.**

Q. Are you familiar with the Wyoming law for physician assistants?

A. **I have no specific intimacy with that law.**

Q. Do you understand that in order for him to become a physician's assistant that a physician has to show that they're going to be his supervising and

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responsible physician?

A. **I understand for him to maintain a license. He was already a licensed physician assistant in the state of Wyoming when I hired him. I became one of his supervising physicians.**

Q. With your understanding that a physician assistant assists in the practice of medicine under the supervision of a licensed physician?

A. **I understand in Wyoming that's correct.**

Q. Okay. And you were the supervising physician?

A. **And I believe there were alternative physicians that were also his supervising physicians.**

Q. For surgeries you performed for patients from with whom you had a physician patient relationship, then he was your assistant, and you were the supervising surgeon?

A. **For my patients, correct.**

Q. Mr. Monaco would have been those -- one of those?

A. **Correct.**

Q. And the physician assistant may perform duties and responsibilities delegated to him by his supervising physician when the duties and responsibilities are provided under the supervision of a licensed physician approved by the board. You're aware that was a statement

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of Wyoming law?

A. **I am. Now -- now to the letter.**

Q. But, again, that arrangement, he was your assistant and you were his supervising physician?

A. **He was the physician assistant employed by Northern Rockies Neuro-Spine, and I was his supervising physician, correct.**

Q. And you're aware it could be grounds for discipline for you to fail to appropriately supervise a nonphysician, such as a P.A., to whom a license has been delegated -- licensee has been delegated medical responsibilities?

A. **I'm aware of what?**

Q. Okay. Let me rephrase it without reading the statute. Are you aware that it could be grounds for discipline for you to fail to appropriately supervise a P.A.?

A. **Yes.**

Q. In fact, part of the Wyoming Board of Medicine's allegations against you in the Monaco case had to do just with that, failing to supervise Mr. Morrell?

A. **Part of the allegations, yes.**

Q. And were you also aware that it could be grounds for discipline to you as a supervising physician if you delegate medical responsibilities to a person who

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is not able to safely, skillfully, and competently provide medical care to the patients?

A. **Seems appropriate.**

Q. And are you also aware that in order for a physician's assistant to prescribe medicine, they have to do so under your supervision as an agent of yours?

A. **I would assume in order to prescribe medications you have to have a state licensure, and if the state licensure requires you to have a supervising physician, then you -- the supervising physician is -- has to supervise prescriptions that are administered by the physician assistant.**

Q. Right. And let me hand you what's been marked Exhibit 7. This is the actual statute that I'm referring to, which is 33-26-510, paren, C. Have you seen that before?

A. **I haven't.**

Q. Do you see where it states that a physician's assistant who is prescribing a -- strike that.

Do you see where it says that a physician's assistant who prescribes medication does so as an agent of the supervising physician?

A. **It does say that.**

Q. And not only was he your physician's assistant, but he was also, as we noted, your employee; you were his

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boss?
A. Well, he was an employee of Northern Rockies Neuro-Spine, but he worked under myself as the supervising physician so he was my -- he was -- I mean, John H. Schneider did not have a separate employment agreement with Harley Morrell.
Q. No, I understand that.
A. It was through Northern Rockies Neuro-Spine.
Q. But Northern Rockies Neuro-Spine is essentially you?
A. Correct.
Q. So in that regard, you as the boss of Northern Rockies Neuro-Spine was the boss of Harley Morrell?
A. Correct.
Q. So you would have had the same rights and abilities as an employer in any employment relationship to supervise, to discipline an employee as anyone else?
A. Correct.
Q. Now, my understanding at West Park Hospital is that they don't allow physician's assistant to have their own independent standalone practice; is that correct?
A. I don't know.
Q. It's your understanding that whatever practice that they have with patients has to be countersigned by the supervising physician?

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A. It's my understanding that if a physician assistant is employed by a physician, that it's incumbent of the physician to countersign orders or documents that have been primarily signed by the physician assistant.
Q. Right. And that was your course and practice?
A. Yes.
Q. You had testified at the trial of the complaint filed by the board of medicine that you understood that you had statutory responsibility for Harley Morrell as your physician's assistant, correct?
A. If the definition is statutory responsibility is everything that you've previously asked me, then yes.
Q. Doctor, you remember testifying at the trial with the board of medicine?
A. Oh, vividly.
Q. The one where there was no jury?
A. That's the one.
Q. And your testimony at that time would have been under oath just as it is here today?
A. Correct.
Q. And do you remember when Mr. Hibbler asked you this question -- and I'm not trying to impeach you; I'm just trying to refresh your recollection -- on line 21 that you had the statutory authority and responsibility for Mr. Morrell?

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A. Okay.
Q. And you said you did?
A. I did.
Q. Is that still accurate?
A. I would assume it is.
Q. Just so it's clear on the record, it's -- the question was: "And you agree pursuant to Wyoming Statute 33-26-501 (a)(v), capital A, that you have statutorily agreed to be responsible for all the medical acts of Mr. Morrell, isn't that correct?"
And your answer was, "Correct." Correct?
A. Correct.
Q. And then you were asked some questions -- this is on page 352 of the transcript -- about West Park, and I'll give you a chance to look at this. And it begins there, sir.
A. Okay. I've looked at it.
Q. And I'd just like to review this with you. It appears that the subject of the discussion was what West Park's practice was, and you said that West Park Hospital doesn't recognize the independent practice of a physician's assistant. What did you mean by that?
A. Well, I'm not sure that I should have answered that way, because I actually don't know if that's true. But I was -- it was in the context of Mr. Morrell as my

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employee and Mr. Morrell as my -- and me being the ubiquitous me of Northern Rockies Neuro-Spine and John H. Schneider. So Mr. Morrell was an employee of mine, and they would therefore not recognize his orders or documents as standalone documents; they would need to be countersigned by myself or actually one of the other supervising physicians if they were covering for me.
Q. So if a physician assistant were to write an order and you did not as the supervising physician approve that, then that order would have no effect?
A. No, that's not true. That's not -- plus it's not possible but it's also not true.
Q. Sir, you stated that there's no physician assistants that have independent practices without a supervising physician?
A. But if a physician assistant has written an order and the nurses execute that order and at some later date the physician looks at that order and disagrees with it, physician still has to countersign that order.
Q. You're saying that a physician is going to countersign an order that they don't agree with?
A. I have no choice.
Q. Why do you say you have no choice?
A. There's a fairly nasty process within every hospital and surgery center I've ever been credentialed

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with that requires -- their medical records department requires signatures everywhere that a physician is required to sign, and even if a physician doesn't agree with a verbal order, if the nurse wrote down verbal order Dr. Schneider and then wrote down a bunch of crazy stuff, I actually still have to sign off on that. Or a physician assistant writes an order, as it's processed through medical records, every single signature needs to be cosigned whether you agree with it or not or else the record continues to kick back to the physician as an uncompleted chart. And after -- different hospitals it's different, but it's generally four to six weeks in that process, the -- if there is an incomplete chart, then the hospital or surgery center will freeze your credentials at that institution and force you to sign off on that chart.

Q. But in fairness, Doctor, if a P.A. does something that you feel like is incorrect and imperils the health of a patient, you're going to correct that order, correct?

A. If I know about it in a timely fashion.

Q. I mean, part of your responsibilities as supervising physician is to step in in those instances where your assistant is not doing the right thing?

A. That's assuming that the supervising physician

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or me in this instance knows that the physician assistant that you're referring to is doing something that imperils a patient.

Q. And that's just up to you and the physician's assistant to make sure you communicate effectively so you know what he's doing?

A. Well, no, it's not just up to that. The physician assistant, if he does something that imperils a patient directly or indirectly, if there's hospital personnel involvement, it's incumbent upon the hospital personnel to identify that as a dangerous act. And per the previous testimony that a physician assistant can't act independent of a physician's practice, it's imperative that the personnel who note the endangering behavior contact the supervising physician.

VIDEOGRAPHER: It's time to change recording tapes. It's right now 2:34 p.m.

(Deposition proceedings recessed from 2:34 p.m. to 2:35 p.m.)

VIDEOGRAPHER: And this is the beginning of tape number four of the video record deposition of John Schneider, Junior, M.D., and the time is approximately 2:35 p.m. Please continue.

MR. MOYERS: Thank you. We're back on the record.

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Q. (BY MR. MOYERS) Doctor, when we last left off, we were talking about the relationship between the physician assistant and the supervising physician. And do you understand that under the statute that it's the responsibility of the supervising physician to have the proper communication with his assistant to make sure that he is aware of what that physician's assistant is doing?

A. Well, I think that's a very nice concept, Counselor, but it depends upon whether a physician assistant is communicating with the supervising physician if the physician assistant has done something that would be questionable.

Q. But the relationship that exists at the hospital is that you are the physician and have a physician patient relationship with your patient, right?

A. At the hospital and in the clinic, yes.

Q. Right. And it is your overall responsibility to make sure that you provide for the safety of your patient?

A. Correct.

Q. And you need to make sure that your staff are adequately compliant with your directives and orders in order for your patients to be safe.

A. Well, my -- that's a correct statement.

Q. Okay. Now, with respect to the supervision of

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Harley Morrell, were there any other physicians who filled that role as a supervising physician besides yourself?

A. Yes.

Q. And what instance would that have come up?

A. Well, if I have -- if I'm traveling physician and the first call responsibility if there was a patient that had an issue would be to Harley Morrell, and then he would -- if I was available by e-mail or phone, he would call me, but if it was an issue where the patient needed to be seen, then the physician that he would go to to discuss the case would have to be one of his supervising physicians.

Q. As it relates to the Monaco case, though, you were the only supervising physician?

A. Well, I was the only physician with regard to the care and treatment of Mr. Monaco, but, again, Mr. Morrell, I believe, had Dr. Steve Emery as a supervising physician and Dr. Jay Winzenried as a supervising physician.

Q. As it related to Russ Monaco?

A. Well, as always relates but specifically -- not specifically to that patient.

Q. I mean, did Steve Emery provide any medical care to your knowledge --

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Q. Let me hand you Exhibit 12. What is that?
A. **This is a fax cover sheet and fax copy of the same thing, the history and physical or consultation sheet that was sent on Mr. Monaco.**
Q. So Exhibit 12 has a fax cover sheet of an unsigned copy of your initial report?
A. **Correct.**
Q. And this fax cover sheet is dated December 9, 2011. Can you help us understand why you are sending an unsigned copy of this report to the Wyoming Board of Medicine on December 9th.
A. **Well, the Board of Medicine would have made an inquiry requesting this, and my practice would have responded by sending the document they had on -- that they were able to access on file to send it to the Wyoming Board of Medicine.**
Q. This handwriting that's on an angle, whose handwriting is that?
A. **Mine.**
Q. Had you not finalized your initial consultation report as of December 8th, 2011?
A. **Had I not finalized my report?**
Q. Sure. This one is unsigned.
A. **Well, I'm not sure what date my -- this -- this unsigned one came from my medical practice to the Wyoming**

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Board of Medicine.
Q. Right.
A. **But I don't know what date they accessed the history and physical or consultation report and brought this into Mr. Monaco's medical records at Northern Rockies Neuro-Spine. It could have been the next day. It could have been the day I dictated this.**
Q. When you signed Exhibit 11, which is that initial consultation, there's no date showing when you actually signed it; is that correct?
A. **Correct.**
Q. And why is it at this point when you send over the fax cover sheet to the Board of Medicine with your initial consultation do you say, "The hospital is trying to cover its own ass"?
A. **Well, the hospital has -- specifically the nursing care of Mr. Monaco at the date and time of discharge was significantly below the standard of care.**
Q. In what respect, sir?
A. **Everything from clinical evaluation to communication with my offices to follow-up with more senior supervised nursing personnel when Mr. Monaco was medically unstable. There was a significant systems failure in the quality of nursing care that was being delivered at the time of Mr. Monaco's discharge, and**

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that --
MR. PAOLI: Oh, sorry, Doc, are you done?
THE DEPONENT: Sure, if you want me to be.
Q. (BY MR. MOYERS) No. I -- do you need to see your answer to see if you're complete?
A. **I think the last thing I was going to say is failure to adequately communicate Mr. Monaco's clinical deterioration to members of my medical staff or myself.**
MR. PAOLI: We need to call the court. It's three o'clock.
MR. MOYERS: I thought they were calling you.
MR. PAOLI: No.
MR. MOYERS: Okay. I don't think -- do you think so?
MR. PAOLI: (Nodded.)
MR. MOYERS: Maybe we should call them and let them know that we're thinking of them.
VIDEOGRAPHER: Okay. Going off the record. It is right now 3:01 p.m.
(Deposition proceedings recessed from 3:02 p.m. to 3:03 p.m.)
VIDEOGRAPHER: Going back on the record. It is right now 3:02 p.m. Please continue.

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MR. EMERY: Before we -- can you read back that answer.
(The requested answer was read back.)
Q. (BY MR. MOYERS) So, Doctor, sometime after Russ Monaco's death and your fax cover sheet of December 9th to the Board of Medicine, you had concluded that Russ Monaco's death was attributable to failures by the hospital?
A. **I had concluded that there was a significant deviation in standards of nursing care, and a breach of protocol was in place when Nurse Fulkerson discharged Mr. Monaco, yes.**
Q. And had you also concluded that your P.A., Harley Morrell, had also deviated from the standards of care?
A. **At that moment, I had concerns about Mr. Morrell's deviation from standards of care, yes.**
Q. Have you since come to the conclusion that Harley Morrell had deviated from the standard of care expected of him as a physician's assistant?
A. **I've come to the conclusion of the opposite, that he did not deviate from standards of care as a physician assistant employed by Northern Rockies Neuro-Spine.**
Q. When did you come to the conclusion that he had

not deviated from the standard of care?
A. Well, I had the opportunity to review all of the depositions in the Wyoming Board of Medicine case as well as communication that Mr. Morrell had with the Wyoming Board of Medicine, and based upon the summary of those communications and depositions, I came to that conclusion.
Q. When was that?
A. I can't give you a specific date, but it's certainly was cumulative during the process of investigation by the Wyoming Board of Medicine and prior to my contested case hearing.
Q. Before that, you had been critical of the care provided by Harley Morrell?
A. Prior to that, I had had concerns about the care provided by Harley Morrell based upon what nurses -- what a nurse had documented in a medical record.
Q. Well, you did more than that. You referred to him as a rogue P.A., had you not?
A. I referred to him in a single instance as a rogue P.A. based upon his deposition before the Board of Medicine in Wyoming.
Q. You're aware he's acknowledged his negligence or fault in the care and treatment of Russ Monaco?
A. Harley Morrell is welcome to acknowledge whatever he wants to.

Q. In this case, Doctor, you have actually given us a couple of documents that are intended, I think, by you to be an affidavit. Let me show you the first one marked Exhibit 14. Could you identify that for us.
A. This is an Affidavit of John Schneider In Opposition to Joint Motion For Consent Judgment.
Q. That's your work product?
A. I signed it so it must be, yes.
Q. The stamp that we see at the end on a date of April 1, 2014, was that intended to be your signature?
A. I believe so.
Q. Is that a stamp that you recognize?
A. I don't recognize that font. This is a document that I would normally have notarized and signed myself, not used a stamp.
Q. Right. And you see this one was not notarized?
A. Nor signed. This is a computer generated font.
Q. Are the words in this, though, yours?
A. Can you tell me which words you're referring to?
Q. Sure. Everything after the heading. This affidavit of John H. Schneider, I'm board certified. Paragraphs 1 through 36.
A. I would say that generally, yes. If there's

specific words that I don't agree with, then I'll identify those when you ask me.
Q. In this -- in this unnotarized version, you state on paragraph 14 that Morrell disobeyed your standing order, failed to follow your procedures and protocols in prescribing medications, acted outside the bounds -- scope and bounds of his employment, and contravened your instruction in the care and treatment of Monaco, correct?
A. It does say that, correct.
Q. And that was your opinion as of April 1, 2014?
A. That was my opinion based upon believing the nurse's documentation as it exists in Mr. Monaco's chart.
Q. And you stated in paragraph 15 that Morrell's care and management of Monaco directly violated the protocol that delineate appropriate medications for every Northern Rockies Neuro-Spine patient at the time of discharge?
A. At that time, my concern was and the statement reflects Mr. Morrell authorizing Mr. Monaco to use all the prescriptions simultaneously. If that were the case, then, yes, he violated the protocol that's set forth by Northern Rockies Neuro-Spine governing prescription medications.
Q. What did his prescription provide?

A. Well, he wrote the prescriptions for the discharge medications on Mr. Monaco.
Q. Right. And you say that those discharge orders violated your protocols?
A. No. The discharge -- Mr. -- Mr. Monaco was discharged with several narcotic medications, and if Mr. Monaco -- excuse me, if Mr. Morrell had told Mr. Monaco or Mrs. Monaco that it was acceptable to use multiple medications at the same time, that's a violation of the protocol.
Q. Uh-huh.
A. Giving the prescriptions to a patient is not a violation of the protocol.
Q. But it's been your testimony that Morrell should not have provided those narcotic medications to Monaco when he was discharged while he was still on a Fentanyl patch, correct?
A. And told to use them simultaneously. We provide medications -- we provide medications to patients who we anticipate will be weaning from one medication to another. That is not an uncommon practice.
Q. And you're aware of some medical records somewhere where Monaco was told not to use these medications simultaneously?
A. He was admonished, as was Kathy Monaco, at

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mistake?

A. If Mr. Morrell had been given the appropriate clinical information and the dangerous vital sign and he ignored that and failed to communicate that to me and discharged the patient, it would be a mistake.

Q. We talked about your unsigned affidavit. You're aware that we had to file a motion with the Court to get yours actually signed, and let me show you what's been marked as Exhibit 17. Could you identify that for us, Doctor.

A. It's a signed copy of the same document.

Q. Did you ever discipline Harley Morrell?

A. I had terse words with Mr. Morrell at various times during his employment.

Q. Let me ask a better question. As a consequence of the Monaco matter, did you ever have terse words with him about that?

A. I did after I reviewed the chart and saw the nurse's notes relative to the oxygen level of 75 percent.

Q. What -- and tell me about that discussion.

A. I challenged him as to his discharge of the patient with a dangerously low oxygen level, and he informed me at that time that, in fact, he was never given that information.

Q. Did you ever have any discussion with him about

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this prescription of narcotics that he sent Mr. Monaco home with?

A. I asked him if he had prescribed -- what medications he had prescribed to Mr. Monaco at the time of his discharge.

Q. What'd he tell you?

A. He told me Dilaudid and the prescriptions that had already been written on the 29th.

Q. Percocet, Vicodin --

A. Percocet, Vicodin, and Valium.

Q. Okay. And did you have any discussion with him about your concerns of sending the patient home with Fentanyl with that narcotic medication?

A. Mr. Morrell had indicated that he did not give -- he had followed my recommendations and consultations since he was present the day before discharge to Mr. and Mrs. Monaco and had not changed the recommendations to only use Fentanyl during the postoperative period.

Q. And this was the discussion you had with him shortly after you learned of Monaco's death?

A. I believe it was in the week or two that followed.

Q. So it was shortly after Monaco's death, Harley Morrell told you, look, I didn't know he had such a

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dangerously low O_2 sat of 75 percent, and I did not violate your prescription drug protocol because I only told the Monacos to use the Fentanyl patch; is that your testimony?

A. Well, I don't think Mr. Morrell said it quite like that, but he did indicate that he was unaware of the dangerously low oxygen level and room air of 75 percent and that at no time did he alter my consultation to the Monacos about using postoperative medications.

Q. So as of that date, based on information he gave you, you had no criticism of his conduct; is that correct?

A. I had a nursing note that challenged his statement about discharging the patient home on oxygen.

Q. Right. So the nurse said one thing, and Harley said something else?

A. Correct.

Q. Which is the same case now. You say that you just recently reviewed all the depositions, and you have Fulkerson saying one thing and Morrell saying the other. And you feel like he didn't do anything wrong?

A. I feel like Mr. Morrell followed standards of care for physician's assistant in the care and management of the patient based upon the information he was provided.

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Q. So even though Mr. Morrell defended himself and said what you said he said, that he didn't know about the dangerously low O_2 sat and didn't breach your protocol, you never the less have offered two affidavits and given a statement to the Board of Medicine highly critical of Mr. Morrell?

MR. EMERY: Object, mischaracterizes, argumentative.

Q. (BY MR. MOYERS) Correct?

A. And they both -- that's mischaracterized on both accounts. The statement I gave to the Wyoming Board of Medicine in my deposition contested case hearing was not highly critical of Mr. Morrell.

Q. You didn't call him as a rogue P.A.?

A. I referred to him as a rogue P.A. once based upon his testimony before the Wyoming Board of Medicine in which his license was revoked.

Q. But we could agree, I'm sure, that here in these affidavits where you say repeatedly that he had disobeyed your orders and disobeyed your protocol, this is pretty harsh criticism of him, is it not?

MR. EMERY: Argumentative, go ahead.

A. It's harsh criticism if he violated the medication protocol by telling Mr. or Mrs. Monaco that it was okay to ignore my consult and to use these

previous statement and say this was -- no, I'm not going to correct my previous statement. This was signed on 12/12/2011. This was dictated -- the discharge summary was dictated on 12/5/2011.

Q. So Exhibit 21 where it says, "Discharge home today," you cosigned that on December 12th?

A. Yes.

Q. And the discharge summary that we have, which we marked as Exhibit 13, you dictated on December the 5th?

A. And signed on December the 12th.

Q. How were you notified of Russ Monaco's death?

A. Teresa Trier called me at eight o'clock in the morning on 12/2/2011.

Q. What were you told?

A. That Mr. Monaco had passed away.

Q. Were you aware that he had an autopsy performed?

A. Well, subsequently I was aware.

Q. Sure. But were you aware that as -- on the day of his death that an autopsy had been performed?

A. I don't recall if -- I don't recall what day it was performed, but I do -- I mean, I know he had an autopsy.

Q. Do you know Dr. Tom Bennett?

A. I do.

Q. How do you know Dr. Bennett?

A. Colleagues at -- when I was a treating physician at St. Vincent's Hospital.

Q. Do you have any criticisms of his qualifications or credentials?

A. I have no idea what his qualifications or credentials are.

Q. He's actually one of about 200 forensic pathologists board certified in the United States, and I think at present he's trying to get certified by Scotland Yard if I heard correctly last time.

Let me hand you what's been marked as Exhibit 22. Have you seen that before?

A. I have.

Q. Do you understand that's Dr. Bennett's post report on Mr. Monaco?

A. It is.

Q. And he concluded that Mr. Monaco had died as a consequence of the prescription drugs that he had taken?

A. He died of a polypharmacy, exact words.

Q. Well, he says "mixed drugs overdose" is the probable cause of death?

A. I believe -- I mean, I'm --

Q. Look at the front page. See at the bottom it

says, "Probable cause of death"?

A. Yes.

Q. "Mixed drug overdose"?

A. Yes.

Q. And the drugs are Oxycodone, Fentanyl, Diazepam and Meperidine?

A. Correct.

Q. Were all the drugs that he had been prescribed?

A. Correct.

Q. Do you have any reason to doubt his conclusion that Mr. Monaco died from a mixed drug overdose from the prescription medication?

A. I don't.

Q. In your discharge summary that we looked at as Exhibit 13, you can reach a similar conclusion in which you say, "No doubt the anesthetic facts -- I think you mean -- of narcotics as well as his undiagnosed sleep apnea likely resulted in a hypodynamic pulmonary stage in which he had an elevated pCO_2 which triggered a cardiac dysrhythmia and sudden death."

A. That I believe is the cause of death.

Q. And so it's your professional opinion that the prescribed narcotics were a contributing factor in his death?

A. Yes.

Q. Whether he had sleep apnea or not was a diagnosis that had never been made; is that correct?

A. Correct.

Q. You didn't make it?

A. Well, I'm the only one that made it, and I've subsequently been corrected by pulmonary physicians that that's not an appropriate diagnosis to be made without laboratory evidence.

Q. A polysomnogram?

A. I believe they do several different tests.

Q. Have you ever seen any dictated reports from Dr. Mainini?

A. Specific to Mr. Monaco?

Q. Yes.

A. No.

Q. Do you know if he ever saw Mr. Monaco?

A. I consulted him while Mr. Monaco was in the hospital, and he indicated he did not believe his consultation was necessary.

Q. Why was that?

A. I called him on 11/29, I believe, and relative to a conversation about sleep apnea, and he had -- he merely told me that he could not do a sleep study while a person is in the hospital, and so he didn't feel like his consultation would be necessary unless there was some

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medications that were given him?
A. I wouldn't agree to that.
Q. Age, gender --
A. 47-year-old male.
Q. -- weight, inactivity, postoperative, multiple narcotic medications, he was certainly at risk for a pulmonary event, was he not?
A. Well, you've listed everything and you're asking me to conclude that he was at risk for a pulmonary event. He was at risk -- he was at the same risk as any other patient who's receiving narcotics, and if they receive too much narcotics, then they will have a respiratory depressive -- those narcotics will cause a respiratory depression.
Q. Which is what happened for Russ Monaco?
A. Correct.
Q. That's why he died?
A. According to Dr. Bennett.
Q. Which you agree with?
A. I do.
Q. We talked earlier, Doctor, about some of the testimony you'd given under oath and the Board of Medicine, and do you remember telling the Board that you were deeply saddened by Mr. Monaco's passing?
A. I was then and I am now.

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Q. You considered Kathy part of the family?
A. Of the professional family.
Q. Right. And you considered his death to be a tragedy?
A. I do then and I do now.
Q. And you consider his death to have been preventable?
A. Had Mr. Monaco not received multiple narcotic medications above the calculated morphine equivalent dose that was safe for his age and status, then he would not have had a respiratory suppressive event.
Q. And you testified that that death had occurred on your service and that you were the doctor at the helm; is that correct?
A. Both are correct.
Q. And do you remember saying under oath, quote, "This is a tragedy, and I am responsible for the tragedy"?
A. This is a tragedy, and I am responsible for entrusting Mr. Monaco's care to nursing that was not competent and entrusting that Kathy Monaco would have followed the specific advice and counsel given to both Russ and Kathy Monaco about the use of prescription medication.
Q. Well, we'll get to those other things for a

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minute, but do you remember testifying, quote, "This is a tragedy and I am responsible for the tragedy. Mr. Monaco's a patient of mine, on my service"?
A. And I just characterized that testimony.
Q. What could you have done to have prevented Russ Monaco's death?
A. Had I been informed by the nurses on 12/1/2011 that Mr. Monaco was in a medically critical condition, had I been informed by them or had Mr. Morrell been informed and then told me that, we would have canceled the discharge, and we would have done a number of things to determine why he was in a critical medical condition.
Q. Would you have reviewed the medication that he had been prescribed?
A. Well, I would have reviewed the medication that he had received that -- so when you say "prescribed," you mean inpatient or outpatient?
Q. Inpatient.
A. Sure, because he would have received it.
Q. So is it your belief that on the day of discharge that he was obtunded and lethargic and had a decreased cognitive status?
A. According to both Kathy Monaco and Russ Monaco's mother, yes.
Q. What is your professional opinion as to why he

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had that change in status?
A. Well, again, the change in status would have precipitated a clinical evaluation. An oxygen desaturation of 75 percent in a postoperative patient has a differential diagnosis. An obtunded state has a differential diagnosis; all of which were relevant to Mr. Monaco. So it would have been -- he would have been -- his discharge would have been canceled, and then we would have gone through the process of determining CAT scans of brain, oxygen. We would have looked to see if he had a pulmonary embolism so that would have -- everything that would have been done, would have received medications like Narcan to reverse potential effects of narcotics to try to determine why his oxygen was low and why he was obtunded.
Q. Does the autopsy that was performed by Dr. Bennett rule out those other alternative explanations for why it had the change in status?
A. I believe so, yes.
Q. Is your belief then that you can safely rule out everything but the medication as the cause for his change in status on the day of discharge?
A. Well, I believe that the polypharmacy caused his change in status. I don't believe that other potential diagnoses on the differential were causing his

BEFORE THE WYOMING BOARD OF MEDICINE

DAVID M. SKOLNICK, DO and
MS. CISSY DILLON,

Petitioners,

v. OAH DOCKET No. 12-110-052
Board Docket No. 12-08

JOHN H. SCHNEIDER JR, MD,

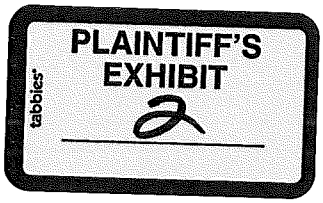
Respondent.

TRANSCRIPT OF VIDEOTAPED HEARING PROCEEDINGS

VOLUME I of III

PURSUANT TO NOTICE duly given to all parties in interest, this matter came on for hearing on the 9th day of September, 2013, at the hour of 8:31 a.m., at the office of the Wyoming Board of Medicine, 130 Hobbs Avenue, Cheyenne, Wyoming, before Ms. Deb Baumer, Hearing Officer, presiding.

Also present were Ms. Jessica Frint, Counsel to the Board; Mr. Kevin Bohnenblust, Executive Secretary to the Board; and Ms. Connie Schepp, Compliance Specialist/ Investigator; Mr. Tom Koetting, Videographer.



A. Same answer, entire length of my practice.

Q. And that's the same drug as we see in this case as diazepam?

A. That's correct.

Q. Okay. How about fentanyl?

A. I have used fentanyl sporadically and strategically for probably 15 -- 10 to 15 years.

Q. Okay. And tell us, if you would, about fentanyl.

A. Well, fentanyl is a potent narcotic that has been quoted to be 80 to a hundred times more potent than morph -- than the equivalent of morphine. So the ability to deliver a higher concentration of the narcotic using a smaller dose of medication would be indicative of using fentanyl. Fentanyl is the most common drug, and its derivative, sufentanil, is the most common drug used by anesthesiologists to suppress the perception of pain during surgical procedures.

Q. Are you aware of -- well, before I ask you that, let me ask you: Under what circumstances -- you say you use it sporadically. Under what circumstances have you used it in the past?

A. Well, at the Board of Medicine, Wyoming's request relative to this procedure, I had the opportunity to look back over I believe it was 2009 and produce for

A. He didn't meet the criteria for discharge, in particular. He really had not been independent and ambulating. He was getting help from his wife, from the nurse, therapist, but spontaneously getting out of bed, walking down the hall, going to the bathroom on his own, he still hadn't done that, and I wasn't going to send him home with Kathy Monaco having to pick him up and get him to the bathroom.

Secondly, he was quite nauseated, had a headache, wasn't holding fluids down, wasn't holding food down, so he needed specific treatment for that. And so based on that, he didn't meet the criteria for discharge. Sometime in the early afternoon of 11/29 we canceled his discharge and converted him from what's called a 23-hour observation status to an inpatient, which is -- which is what we do with everyone who has private insurance.

Q. So what happened with respect to his pain levels during that day?

A. Well, during that day, on 11/29, he had good pain control. He was -- he had been receiving some oral medications, but -- and that includes Vicodin, I believe, Percocet, and Valium. And that was adequate to keep his pain under control. But as the day wore on, his pain level went from a 1 to 2 out of 10, to a 5 out of 10. So even prior to him going to sleep that night of the 29th,

his pain level had started to escalate.

Q. What happened after he went to sleep that night?

A. So apparently at 1:30 in the morning, as documented in the records, the nurse's notes, Mr. -- Mr. Monaco was up trying to go to the bathroom, or was going to the bathroom, and had an excruciating event where he had severe back pain. He had no leg pain. He had no incontinence, but he had severe back pain. And that required the nurses to use some significant medications to try to get that pain under control. And according to nursing, as well as according to what I found out later on the 30th, he and Mrs. Monaco were literally up all night where he was in severe pain.

Q. Okay. And how did he describe that pain according to the nurse's note?

A. Well, excruciating, the worst pain of his life, 11 out of 10.

Q. There's a note 11 -- I guess it looks to me like 11/30/11 that appears on the second half of Exhibit C-15.

A. Yes.

Q. Whose handwriting is that?

A. Mr. Morrell.

Q. Okay. You countersigned that?

A. I did.

Q. Were you there at 7:00 in the morning on the

This is a Wednesday. And on this Wednesday, I go to the surgery center at 6:30 in the morning, because Wednesday is my block day at the ambulatory surgery center in Cody, Wyoming. So I'd gone to the surgery center to get those patients consented and prepared for surgery. So I did not see Mr. Monaco that morning.

Harley Morrell went, saw the patient, did his evaluation, wrote his orders, and then called -- and the most -- other than -- the most significant thing that Mr. Morrell called about was not Mr. Monaco's pain or the changes that have occurred in the narcotics -- the medications he had written for, it was to tell me two things: one, Mr. Monaco's not ready to go home; and, two, Mr. Monaco's Jackson-Pratt drain has put out 580 cc's and he has a headache.

So for a neurosurgeon, the postoperative period after an extensive laminectomy, a significant increase in the Jackson-Pratt output and a headache has very significant ramifications as to what's going on clinically.

Q. And what are those ramifications?

A. Well, the very first thing we think of is this patient has -- if you look at the operative note it talks about making sure there's not a spinal fluid leak at the end of the operation. In fact, the Jackson-Pratt output

Mr. Morrell, you know, no -- and I think Mr. Morrell's orders -- I can flip to that --

Q. Where would we find those?

A. C-8.

Q. Okay.

A. So Mr. Morrell's orders are noted beginning mid-page at 11/30 -- on 11/30 at 0700 in which he has several orders: fentanyl patch, 50 micrograms, ambulate t.i.d. out of bed, something about two, three to four hours -- three to four times per day for 30 minutes. I can't read the rest of that.

Q. Does that look like chair, maybe?

A. Ah, yeah. Out of bed to a chair, up in chair, three to four times a day for 30 minutes.

Advance bowel protocol. Mr. Morrell -- Mr. Monaco may have said he was constipated, so we have a bit more aggressive bowel program to get people to defecate. He rewrote, even though it was previously written, physical therapy, occupational therapy. He wrote a prescription for Dilaudid, Q4 to 6 hours PRN for pain, 4 milligrams. Wrote for Percocet, I think that says for -- it says continue -- I think it says continue Percocet for something. I can't read it. He had been previously receiving that Percocet. Valium, 5 milligrams IV Q six hours, scheduled basis. And then -- so that was

his note from 0700. And then there's a break and he re -- he restarts his orders 1 and 2 after talking to me. Bedrest -- it says bedrest today, can get up to restroom and can -- oh, can get up to restroom and eat something --

Q. Meals, maybe?

A. -- yeah, perhaps, and eat meals. So bedrest, except he can get up to go to the bathroom, and he can sit up to eat meals.

Q. And the bedrest issue was a Jackson-Pratt issue?

A. Yeah, the bedrest issue was directly related to that issue Jackson-Pratt output with a headache.

Q. How about the fentanyl patch, Dilaudid, Percocet and Valium?

A. Well, Mr. Morrell did not specifically ask me, nor did I specifically direct him to write those orders on 11/30 at 0700.

Q. And your thought about them today is what?

A. Well, on 11/30 at 3 p.m., I made rounds on this patient. I looked at the orders. I looked at the chart. I looked at the medications that were given. So I believe Mr. Morrell used his best judgment relative to the care and management of -- and his understanding of these medications that he did -- that he could at the time of 0700 when he wrote this prescription.

At 3 p.m., when I saw the chart, I identified

that the patient had fentanyl written and Dilaudid written, and I did not discontinue them. And so whether I would have chosen those medications first or not is somewhat moot. At 3 p.m. I saw he was on them, and I did not discontinue them.

Q. Why not?

A. It has to do with acute, subacute and anticipated subacute to chronic pain management. Mr. Monaco required an enormous amount of narcotic medication. And the Board of Medicine has done a nice job at annotating that into what was received in the entire Exhibit D, D-1 through D-3, list all the medications that were given and the time they were given.

So Mr. Monaco has had -- in my view of this, at 3 p.m., is that Mr. Monaco has been receiving narcotics and a significant amount of Vicodin prior to his admission for almost a month prior to coming in. In order to get pain control in Mr. Monaco, both going into the subacute period, we've got to address two issues: his acute pain, and what will become subacute, and oftentimes in a patient like this, with this body habitus, a subacute to chronic pain issue.

So the choice of 50 micrograms of fentanyl, I believe, in talking to Mr. Morrell, had to do with addressing Mr. Monaco's needs after discharge, when he was

in a subacute period for his overall pain picture that extends back now almost five weeks, versus the acute pain management that was necessary because we just did a big back surgery on him. So it's a little more complicated than just saying is this a good drug or is that a good drug.

Q. At 3:00 in the afternoon, the fentanyl patch had been on for how long?

A. Eight hours.

Q. And if the testimony is, I guess, it was placed shortly after 8:00 -- I'm going to quibble an hour with you --

A. Okay.

Q. -- seven hours?

A. Seven hours.

Q. Okay. The most recent -- well, in addition to that, he had been receiving other narcotics, correct?

A. Yes.

Q. And the most recent pain assessment was what?

A. When we saw him at 3:00 in the afternoon -- and Mr. Morrell wasn't with me when I first entered the room, but he came shortly thereafter -- he was describing his pain at a 3 out of 10. So he went from severe pain at 11 out of 10, sometime in the early morning hours. He had a -- when Mr. Morrell made rounds, it's actually

documented his pain level had dropped down to 2 to 3 out of 10. But then he went back up to 5 out of 10 a few hours later. Okay, so we're talking about the morning of 11/30. And when we saw him at 3:00 that afternoon, he described, which is, of course, very subjective, but he described his pain at a 3 over 10 level. So I really had to assess.

I saw Mr. Monaco at 3:00. I had this story, and Kathy Monaco was there, of this incapacitating, severe pain, this -- and then the attempt to control that acute pain, as well as a -- somewhat of a -- it's a strategic decision as to how are we going to control this patient's pain when he goes home? And so Mr. Morrell, choosing the fentanyl patch, was acceptable to me at the time.

Q. And I think I missed it. Was there a point after the placement of the patch and the use of other narcotics that his pain actually went back up to 7 out of 10?

A. Yes.

Q. And that was at what time, did you say?

A. Well, it was definitely later that day, after 3 p.m., but he had received -- not only that he had the fentanyl patch on, received Demerol, Phenergan, Dilaudid, Valium multiple times, but he still reported the night of 11/30 that his pain had gone all way up to 7 out of 10.

providers to know that the patient is adequately oxygenating, getting enough oxygen to his blood, where we would not expect clinical symptoms of low oxygen to be manifest.

Q. And if you have a standing order and a protocol and the understanding that -- that oxygen levels on room air should not drop below 90 percent on a pulse oximeter, what do you expect would happen if they do?

A. That oxygen will be supplemented to their treatment regimen.

Q. And how about if you're not around and don't have any knowledge that it's happening, what would you expect to happen?

A. I would not expect the patient to go without oxygen supplementation if the oxygen saturations are below 90 percent at any time during their hospital admission or at discharge.

Q. So at 3:00 in the afternoon, you're aware or are you aware of the 80 percent issue?

A. I am aware.

Q. Okay. And what do you do with respect to that?

A. Well, I hadn't seen Mr. Monaco that day. Harley Morrell made rounds in the morning and called me. So I'm done with my surgeries over at the surgery center in Cody. It's a quarter mile away from the hospital, maybe half

that you understand we can only give you this patch medication -- and I very specifically said you can only use -- I had written a prescription for the Vicodin from 11/29 -- you'll only be able to use an intermittent occasional pain pill for breakthrough acute pain while this medication, fentanyl, is creating a steady state narcotic level after you go home.

So I very specifically in the presence of Mr. Morrell, presence of the Monacos, went through the use of these medications at the time of discharge. But even more importantly, my concern about the respiratory suppression, and, in fact, I referenced the 80 percent on room air. Now, you saw him two hours later on room air, his oxygen saturation was up to 92 percent, and he was asleep when we first walked in. That being said, for that 30-minute conversation I had with him, he was awake, communicative, mental status was normal. He was moving his extremities, and his oxygen saturation never fell below 90 percent during that 30-minute conversation.

Q. So was that the last time you ever saw Mr. Monaco?

A. It was.

Q. Tell us what happened the following day.

A. So Mr. Monaco -- well, the other -- the other thing that -- I mean, Mr. Monaco felt pretty good at

A. That's correct.

Q. And what are those medications?

A. The first one is Keflex 500-milligram tablet, which actually is no -- it's an antibiotic, oral antibiotic, which is no longer necessary, given Mr. Monaco's four days out from surgery. Diazepam or Valium 5-milligram tablet; hydromorphone, 4-milligram tablet, which is the same as Dilaudid; oxycodone, acetaminophen, Percocet, 7.5-milligram tablet; fentanyl, 50-microgram-per-hour transdermal patch.

Q. Additional fentanyl patch?

A. Correct.

Q. Do you believe that those drugs were appropriate for prescribing for Mr. Monaco upon discharge?

A. I do not believe they were appropriate.

Q. Okay. And were you aware of any of that?

A. Well, I was aware that he was going home with the fentanyl patch in place, the 50 microgram that we had given him in the hospital, and that he had a prescription for the Valium and the Percocet.

Q. The record indicates that there was also a shot given to Mr. Monaco subsequent to the discharge order being entered; is that correct?

A. Well, there is -- there was a shot ordered, and there was two shots given. One that Mr. Morrell had

at 9:11 a.m. there's 5 milligrams of Valium given. So here's a patient who has an oxygen saturation of 75 percent, who, at least by the wife's -- has noted that he's lethargic, can't keep him awake. He's obtunded. And Nurse Fulkerson has no documentation of any clinical assessment, but then at 10 a.m., going out the door in that clinical condition, he gets another shot of Demerol and Phenergan and another Dilaudid.

So after 7 a.m., based upon an order given by Mr. Morrell at 7 a.m., patient receives a Demerol and Phenergan shot. That's acceptable. That was an order given by the provider. But then the additional Valium, the additional Dilaudid, a mistaken extra dose of Demerol and Phenergan given literally as he's going out the door.

The significance of all this is that -- why those medications were given, number one, after a discharge has been -- I'm talking about the Valium, the Dilaudid and the extra Demerol and Phenergan shot, why they're given, I can't explain, when his pain has been listed at 0 out of 10. At 9 a.m. Nurse Fulkerson has noted his pain is 0 out of 10. So why these additional medicines are necessary, I don't know.

But it is the combination of -- the desire in place -- in me accepting a fentanyl patch and the subsequent observation over 24 hours, utilizing whatever's

practice, so that I really don't have the capacity to practice medicine and make a living. The -- a restriction on my license and these actions that prevented me from gaining credentials at any hospital institution, and so my practice has been completely curtailed.

Q. How old are you, Dr. Schneider?

A. 52.

Q. Do you have a family?

A. I do.

Q. And tell us about them.

A. Well, my wife has stuck through me -- stuck with me through all this. So I have a wife that's 50. I have three children; two in college, just starting college. One is a sophomore, one is a freshman. And I have a 15-year-old who's a sophomore in high school.

Q. And other than practice medicine, what have you done to earn income in your adult life?

A. Nothing.

Q. Have you learned from what's occurred with the Monaco situation anything?

A. Well, I've -- I have learned many things. As I said yesterday, this is a -- this is a tragedy, and I'm responsible for the tragedy. Mr. Monaco's a patient of mine, on my service. And I believed up until this event occurred that I did the best I could do, having other

Q. And that is dated February 10, 2012.

And then we move on to Exhibit J, which you said then in February 18, 2012, some eight days later, you have criticism now, for the first time, of Mr. Morrell. And now let's look at Exhibit L. And specifically we will look at page L-5. And on page L-5, at the bottom -- give me a moment. Let me find it.

At the bottom of L-5 you talk about that if your protocols had been followed -- and you've already testified that Mr. Morrell didn't follow your protocols; isn't that correct?

A. I have.

Q. Okay. So again, you would agree with me that on Exhibit L, March 8, 2012, and your response to the Montana Board of Medicine, you again criticized the way in which your protocols were not followed by Mr. Morrell?

A. That's a correct statement.

Q. Okay. But you were Mr. Morrell's supervising physician. We all know that, correct?

A. Correct.

Q. Okay. And you agree that pursuant to Wyoming Statute 33-26-501(a)(v)(A), that you have statutorily agreed to be responsible for all of the medical acts of Mr. Morrell; isn't that correct?

A. Correct.

USE [illegible] E PLATE OR PRINT PATIENT ID HERE

PHYSICIAN'S ORDERS

MONACO, RUSSELL J
M01426214 47 M 05/07/64
11/28/11 0923
W0186374
SCHNEIDER MD, JOHN

DRUG ALLERGIES Morphine

ANOTHER BRAND OF DRUG IDENTICAL IN FORM AND CONTENT MAY BE DISPENSED UNLESS CHECKED ☐ W19

Date & Time Ordered	ORDERS AND SIGNATURE	Signature of Physician and Nurse attending to order
11/29/11 1420	T.O. 1) Cont Ancef 1gm IVPB Q 6hrs	
	2) Disregard DC orders	
	3) Insert foley cath	
scan T.S. 11-29-11 1430	4) Ambulatory	noted @ 1430 [illegible]
	RBHV	
	Haily Morrell PA / [illegible] RN	
11/29/11 1800	T.O. 1) Foley cath PRN - If pt does not void after 8 hrs insert	[illegible] pr
	RBHV	
T.S. 29-11 1500	Hailey Morrell / [illegible] RN	noted @ 1800 [illegible] pr
11/30/11	24° Chart ✓ 0330 [illegible] RN	
11/30/11 0710	1) [illegible] patch [illegible] q 3 days ✓	
	2) Ambulate [illegible] [illegible] in chair 3-4x day for 30 mins.	
	3) Advance level [illegible] ✓	
	4) [illegible]	
scan	5) [illegible]	Noted [illegible] RN 11-30-11 @1030
11-30-11 0735	6) [illegible]	
	7) [illegible] q 6 hrs scheduled basis ✓	
11/30/11 0710	8) bed rest today	
	9) [illegible] & eat meals ✓	
T.O. 11-30-11 0745		

PLAINTIFF'S EXHIBIT 3

D-625
[illegible]ICIANS' RECORD CO., BERWYN, ILLINOIS

PHYSICIAN'S ORDERS

PRINTED IN U.S.A.

CHART COPY

BEFORE THE WYOMING BOARD OF MEDICINE

DAVID SKOLNICK, D.O., and MS. CISSY DILLON,	)	
Petitioners,	)	Docket No. 12-08
vs.	)	OAH Docket No. 12-110-052
JOHN H. SCHNEIDER, JR., M.D.,	)	
Respondent.	)	

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER REVOKING THE WYOMING MEDICAL LICENSE OF JOHN H. SCHNEIDER, JR., M.D., WYOMING PHYSICIAN'S LICENSE NO. 5973A, AND IMPOSING A CIVIL FINE AND ASSESSING COSTS

THIS MATTER having come before a hearing panel and quorum of the Wyoming Board of Medicine (Board) consisting of Michael Jording, M.D.; Ms. Jody McGill; Kristina Stefka, M.D.; Jeffrey Storey, M.D.; and Donald Tardif, PA-C, at a Board meeting on January 24, 2014, for the conclusion of a contested case hearing upon a COMPLAINT AND PETITION filed by David Skolnick, D.O., and Cissy Dillon (Petitioners) against John H. Schneider, Jr., M.D. (Respondent), alleging multiple violations of the Wyoming Medical Practice Act, WYO. STAT. ANN. §§ 33-26-101 through -601. The Petitioners were represented by Bill G. Hibbler, Esq., Special Assistant Attorney General, Board Prosecutor; and Respondent was represented by Stephen H. Kline, Esq., and Stephenson D. Emery, Esq. The hearing was conducted by Deborah Baumer, Esq.

considered the entire record.

CASE MANAGEMENT/SCHEDULING ORDER, Pages 1-2 (bold in original).

34. On August 26, 2013, the Board convened to allow the parties to voir dire the hearing panel members. Both parties passed the panel.

35. From September 9 through September 11, 2013, the Hearing Examiner held the evidentiary portion of the contested case hearing in this matter. At the evidentiary hearing, the Hearing Examiner admitted and received into evidence Petitioners' Exhibits A through L and N through II and Respondent's Exhibits 1 through 5, 11, 14 through 17, 19, and 20.

C. Documentary Evidence

i. General

36. The prescribing directions for fentanyl transdermal patches contain the following "black box warning":

> **DURAGESIC® contains a high concentration of a potent Schedule II opioid agonist, fentanyl. Schedule II opioid substances which include fentanyl, hydromorphone, methadone, morphine, oxycodone, and oxymorphone have the highest potential for abuse and associated risk of fatal overdose due to respiratory depression. Fentanyl can be abused and is subject to criminal diversion. The high content of fentanyl in the patches (DURAGESIC®) may be a particular target for abuse and diversion.**
>
> **DURAGESIC® is indicated for management of persistent, moderate to severe chronic pain that:**
>
> - **requires continuous, around-the-clock opioid administration for an extended period of time, and**

- **cannot be managed by other means such as non-steroidal analgesics, opioid combination products, or immediate-release opioids**

DURAGESIC® should ONLY be used in patients who are already receiving opioid therapy, who have demonstrated opioid tolerance, and who require a total daily dose at least equivalent to DURAGESIC® 25 mcg/h. Patients who are considered opioid-tolerant are those who have been taking, for a week or longer, at least 60 mg of morphine daily, or at least 30 mg of oral oxycodone daily, or at least 8 mg of oral hydromorphone daily or an equianalgesic dose of another opioid.

Because serious or life-threatening hypoventilation could occur, DURAGESIC® (fentanyl transdermal system) is contraindicated:

- **in patients who are not opioid-tolerant**
- **in the management of acute pain or in patients who require opioid analgesia for a short period of time**
- **in the management of post-operative pain, including use after out-patient or day surgeries (e.g., tonsillectomies)**
- **in the management of mild pain**
- **in the management of intermittent pain (e.g., use on an as needed basis [prn])**

(See CONTRAINDICATIONS for further information.)

Since the peak fentanyl concentrations generally occur between 20 and 72 hours of treatment; prescribers should be aware that serious or life threatening hypoventilation may occur, even in opioid-tolerant patients, during the initial application period.

. . . .

DURAGESIC® is ONLY for use in patients who are already tolerant to opioid therapy of comparable potency. Use in non-opioid tolerant patients may lead to fatal respiratory depression. Overestimating the DURAGESIC® dose when converting patients from another opioid medication can result in fatal overdose with the first dose (see DOSAGE And ADMINISTRATION - Initial DURAGESIC Dose Selection).

. . . .

INDICATIONS AND USAGE

DURAGESIC® is indicated for management of persistent, moderate to severe chronic pain that:

- requires continuous, around-the-clock opioid administration for an extended period of time, and
- cannot be managed by other means such as non-steroidal analgesics, opioid combination products, or immediate-release opioids.

DURAGESIC® should ONLY be used in patients who are already receiving opioid therapy, who have demonstrated opioid tolerance, and who require a total daily dose at least equivalent to DURAGESIC® 25 mcg/h. (see **DOSAGE And ADMINISTRATION**). Patients who are considered opioid-tolerant are those who have been taking, for a week or longer, at least 60 mg of morphine daily, or at least 30 mg of oral oxycodone daily, or at least 8 mg of oral hydromorphone daily or an equianalgesic dose of another opioid.

. . . .

Dose Selection

Doses must be individualized based upon the status of each patient and should be assessed at regular intervals after DURAGESIC® application. Reduced doses of DURAGESIC® are suggested for the elderly and other groups discussed in PRECAUTIONS.

. . . .

> In selecting an initial DURAGESIC® dose, attention should be given to 1) the daily dose, potency, and characteristics of the opioid the patient has been taking previously (e.g. whether it is a pure agonist or mixed agonist-antagonist), 2) the reliability of the relative potency estimates used to calculate the DURAGESIC® dose needed (potency estimates may vary with the route of administration), 3) the degree of opioid tolerance and 4) the general conditions and medical status of the patient. Each patient should be maintained at the lowest dose providing acceptable pain control.

Exhibit G-1, 2, 11 and 31 (Bold face and underscore in original).

37. Mr. Doe's wife was employed by Respondent in his Billings, Montana, clinic as his medical records coordinator. Exhibit K-7.

38. Mr. Doe was 47 years old when he died. Exhibit C-1.

39. During Mr. Doe's surgery and WPH stay, PA Morrell assisted with his care under the Respondent's supervision. Exhibit C.

40. In 1995, Eugen Dolan, M.D., performed lumbar disc surgery on Mr. Doe. Exhibit B.

41. Mr. Doe's insurance plan "contains an Exclusive Provider Agreement with **Billings Clinic** for all services. . . . If any charges are incurred with any other provider, no Plan payment will be made." The plan also provided that "[e]mergency care for a Medical Emergency or Outpatient Hospital laboratory and x-ray services can be provided at any facility. If the Covered Person incurs charges at a non-Exclusive Provider facility due to a Medical Emergency, charges will be paid at the Exclusive Provider coinsurance level." Exhibit E-1 through 4 (emphasis in original).

42. The ICD-9 code, which is a diagnosis and procedures codes for billing, for cauda equina syndrome was 344.6 and without mention of neurogenic bladder was

To: The medical Review Panel

In response to the letter dated October 1, 2012, I Harley G. Morrell will make my response to the Wyoming Medical Review Panel in regards to the case MRP 12-36/Claim of the Estate of Monaco.

I was the Physician Assistant for Dr. John Schneider from May/June 2006 until January of 2012, when I left his employment due to this situation and the advice of the Wyoming Board of Medicine. I have provided several depositions in regards to this case for the Wyoming Board of Medicine. I was advised by the board that I had been thrown under the bus in regards to this claim.

Dr. Schneider saw and admitted Mr. Monaco on November 28, 2011, for what was said to be an emergent surgery due to neurological decline. A L2-L5 decompression was performed and I assisted in the procedure. Mr. Monaco was kept in the hospital for several additional days due to pain control and what I was told was issues with sleep apnea. Mr. Monaco had pain control problems and would not get out of bed until additional pain medications were on board. All of these medications were given under the direction and supervision of Dr. Schneider. I was unaware of the black box warning for the Fentanyl patch until it was discussed with me at my Wyoming Board interview in January of 2012. This medication had been given to many patients during their hospital stay and several were sent home on this medication as well as other pain medications as part of Dr. Schneider's protocol for pain control. I never took it upon myself to send anyone home on pain medication outside of Dr. Schneider's protocol and Dr. Schneider was always aware of patient care and what medications the patients had received. I had been told on several occasions, that I needed to be more open with the pain medications and not be so hard on not dispensing these medications to the patients that called in complaining of pain. I was told by the Wyoming Board of Medicine, that Dr. Schneider stated I was a rogue PA and he didn't know what I was doing with his patients. This is a flat out lie as Dr. Schneider was always aware of the care the patients received. Dr. Schneider had to know what was going on with his practice at all times and was always looking over my shoulder and micro managed his practice where I felt I had no ability to make any decisions in regards to patient care.

Should I have known about the black box warning with the Fentanyl patches; yes I should have, but at the time I was prescribing the medication I didn't. I do not feel I am at fault for the death of Mr. Monaco as I was following the direction of my supervising physician Dr. Schneider. I accept my part in this event as I should have stood up and said something to Dr. Schneider about the use of pain medication with his patients, but at that time I was afraid of losing my job if I stood up to him. I saw first-hand what happens when you try to stand up to Dr. Schneider or say something he may take as you're saying he doesn't know what he is doing and you're fired on the spot. If I could trade places with Mr. Monaco I would. The family lost a husband, father, son and uncle and I continue to struggle with this.

The morning Mr. Monaco was discharged from the hospital; I received a call from the floor nurse stating that Mr. Monaco's oxygen saturation's were low, but from what I recall no number was given to me. The nurse stated they wanted to send Mr. Monaco home on oxygen and I relayed this information to Dr. Schneider who was sitting next to me on his computer. After relaying the information, Dr. Schneider told me to let them know to sit him up and take some deep breaths and the saturation levels would return to

normal. If there were any issue's to call back; otherwise discharge as ordered and have Mr. Monaco follow-up with his primary care to be evaluated for sleep apnea. All medications were usually written by myself as this was part of my job, but always done under the direction and supervision of Dr. Schneider.

The discharge was given under the direction and orders from Dr. Schneider and Dr. Schneider was aware of the situation at all times. Mr. Monaco was warned by me about the risk with the amount of medication he was taking and the risk of respiratory depression while in the hospital. I did not discharge Mr. Monaco on my own recourse and did so under the direction of Dr. Schneider. I do not recall ever receiving a call from the floor stating Mr. Monaco had low saturation levels at any time during the hospital stay. I saw on the chart there was 80% documented on one day. When I would see Mr. Monaco for rounds; Mr. Monaco was sitting up in bed or standing in the room and never had oxygen on during these visits and never complained of any breathing problems. Mr. Monaco's constant complaint was the pain, even on the multiple medications. I felt I did my best to care for Mr. Monaco while at the hospital. I was told by Dr. Schneider, that he had spoken to Dr. Mainini about the sleep apnea, and that Mr. Monaco had refused to use the C-pap recommended by Dr. Schneider. I was following the direction and orders given to me by Dr. Schneider in the care of Mr. Monaco and at no time took it upon myself to make any decision in regards to the care of Mr. Monaco without discussing this with Dr. Schneider.

I am deeply saddened by what happen by what happen to Mr. Monaco and the pain his family feels with his lost. I don't feel at the time I was giving substandard care, but in retrospect I would have done a lot of things differently, knowing what I know now. I have accepted my responsibly for this as the Wyoming Board of Medicine has already taken action on my license. Dr. Schneider has tried to blame me for the whole incident and I feel for all I gave to him during my employment; that he is looking for a scape goat. I relayed all information to Dr. Schneider in regards to the care and discharge of Mr. Monaco and feel that I did what I could for Mr. Monaco.

Thank You

Harley Morrell, PA-C

Harley Morrell
2608 27½ Rd
Grand Jct, Co 81503
512-550-1563

BEFORE THE WYOMING BOARD OF MEDICINE

JAMES A. ANDERSON, M.D., And RAY JOHNSON, PA-C, Petitioners, vs. JOHN H. SCHNEIDER, JR., M.D., Respondent.	OAH Docket No. 12-110-052 Docket No. 12-08 VIDEO DEPOSITION OF THOMAS BENNETT, M.D.

Billings Clinic
Billings, Montana
August 28, 2012

APPEARANCES:

Bill G. Hibbler
BILL G. HIBBLER, P.C.
P. O. Box 2143
Cheyenne, Wyoming 82003-2143

For the Wyoming Board of Medicine.

Stephen H. Kline
KLINE LAW OFFICE, P.C.
P. O. Box 1938
Cheyenne, Wyoming 82003-1938
-and-
Stephenson D. Emery, Esq.
WILLIAMS, PORTER, DAY & NEVILLE
P. O. Box 10700
Casper, Wyoming 82602

For the Respondent.

Also present: Connie Schepp
Joel Hageman,
Videographer

have profound respiratory depression as a factor with that central nervous system depression.

Q. Let me stop you right there.

Define what you mean by "respiratory depression".

A. It means that it decreases a person's drive to breathe.

If you have a person that is breathing normally, but you put them on morphine, sometimes they may not be as responsive to low levels of oxygen, or higher levels of carbon dioxide in their system, which would stimulate them to increase their breathing.

So, what it does, it slows down the breathing. Obviously it's interfering at the brain level with that drive to breath and whatever is stimulating that.

So, in my opinion, the combined effects of those three narcotics, with also the Valium, added to it because of its central nervous system depression activities.

Those are four significant drugs, powerful drugs that are slowing down the central nervous system and ultimately decreasing his breathing to the point where it appears it just

stops.

Q. If you look at Exhibit N, the very last page, that that testimony concerning respiratory depression, does that comport with what is identified in the middle of that page where it says,

"Signs associated with fentanyl toxicity include severe respiratory depression, seizure, hypotension, coma and death"?

A. Yes, sir.

Q. And since we are on Exhibit N, let's just stay right there.

If you would turn to -- well, let's stay on the last page.

Now, you said that he had the 50 microgram patch on, correct?

A. Correct.

Q. And according to the last page of Exhibit N, it identifies that you would expect -- the range you would expect to see within 24 hours of the 50 microgram patch would be .6 to 1.8, and he registered at a 1.2, correct?

West Park Hospital District
707 Sheridan Avenue
Cody, Wyoming 82414

Discharge Summary

Patient: MONACO,RUSSELL J
DOB: 05/07/1964
Age/Sex: 47/M
Admit MD: SCHNEIDER MD,JOHN H
Attend MD: Schneider, John H MD
Date of Admission: 11/28/11
Discharge Date: 12/01/11

Acct #: A01426214
Med Rec #: W0186374
Status: DIS IN
Location: ACU
Room/Bed: W19-W
Report #: 1206-0034

DISCHARGE DIAGNOSES:
1.Severe cauda equina syndrome.
2.Undiagnosed probable sleep apnea.
3.Diabetes mellitus.
4.Morbid obesity.
5.Chronic pain syndrome.

HOSPITAL STAY:
Mr. Monaco was brought in somewhat urgently and emergently for decompressive lumbar laminectomy due to high-grade his spinal stenosis at the L2-L3 level with a fairly rapid decline in neurological function. He underwent a successful decompressive lumbar laminectomy on date of admission. He is primarily a Billings patient and we were unable to transfer him back to Billings to a surgical practice at Deaconess Billings Clinic as they did not answer our requested calls. He underwent a successful decompressive laminectomy and was uncomplicated postoperatively except for fragile glucose that required subcutaneous insulin and was fairly clear to us to be somewhat of a Pickwickian syndrome. He has had previous extensive dissection before for a single-level back surgery and we had merely recreated his previous incision. He did require medication more than just intravenous medication for pain management or else he refused to get out of bed. He was ultimately placed on a steady state of fentanyl patch and intermittent Dilaudid every four to six hours, and this made him comfortable enough that he would ambulate with physical therapy. He was treated with Lovenox and SCDs postoperatively in order to prevent deep vein thrombosis. We kept Mr. Monaco in the hospital several extra days because of our concern about him overall medically. We had ordered postoperative BiPAP/CPAP from respiratory therapy under observation as we anticipated that he likely does have sleep apnea based upon his wife's history of his severe snoring and periods of respiratory pause when he is sleeping. This was done under the observation of respiratory therapy, however he refused that treatment. He kept his oxygen on while in bed, but took it off when ambulatory, and he was observed on a steady stated fentanyl medication with intermittent Dilaudid to maintain an oxygen saturation while sleeping of better than 90%. When he was resting and hypodynamic, his saturations empirically fell into the 80s, however, with a single deep breath that would change and again he had refused home oxygen. Mr. Monaco was counseled on this extensively by both respiratory therapy nursing, as

PLAINTIFF'S EXHIBIT 7

Ex. A - 8

well as at our offices and we impressed upon the need to follow up with his primary care physician and sleep studies. I discussed this with Dr. Mainini as well. He was discharged home in a stable condition on the above medication and was ambulatory independent. There were no complications during his hospital admission.

As of this dictation, December 05, 2011, Mr. Monaco has passed away. Tragically, he was discharged last Thursday midday and went home without incident or complication. He was ambulatory at home and in reasonably good pain control, and apparently went asleep in his recliner on the night of December 01, 2011, for what his wife says is approximately 10:30-11 o'clock at night. He was apparently comfortable with his medication, not having any respiratory distress or chest pain. His wife, Kathy Monaco, found him the next morning early blue and lifeless. We were contacted about 8:30 in the morning and requested an autopsy. I have only spoken briefly with the coroner with the preliminary results which ruled out a DVT and pulmonary embolism and ruled out a myocardial cardial infarction. However, apparently his heart was large for his age. As I discussed with the family as well as our offices, this acute sudden death is likely a manifestation of cardiac dysrhythmias such as ventricular fibrillation, ventricular tachycardia, and ventricular fibrillation. I had a lengthy discussion with Dr. Stephen Mainini regarding the undiagnosed sleep apnea, patient prolonged hospitalization, and the refusal use the CPAP or BiPAP. Dr. Mainini indicated that home oxygen itself would not have been adequate to control the oxygen situation in Mr. Monaco. In fact, much like COPD patients, O_2 likely would have suppressed his oxygen drive further which is primarily from the CO_2. No doubt the anesthetic effective of narcotics as well as his undiagnosed sleep apnea likely resulted in a hypodynamic pulmonary stage in which he had elevation in his pCO_2 which triggered a cardiac dysrhythmia and sudden death. I have reviewed this in great length and asked Dr. Mainini to do a quality assurance review, however, with a refusal to use the CPAP/BiPAP and the steady state of medication with observation in the hospital by nursing care and respiratory therapy for almost 48 hours on these medications without a respiratory event, it is tragic but difficult to imagine we could have prevented his untimely cardiac dysrhythmia and of course his passing.

JS/dsk/vn/bl 2761971

<DOS:20111128>

Dictated By: SCHNEIDER MD,JOHN H
Electronically Signed By:
Signed Date/Time:

Dictated Date/Time: 12/05/11 1727 EST
Transcribed Date/Time: 12/06/11 0358 EST

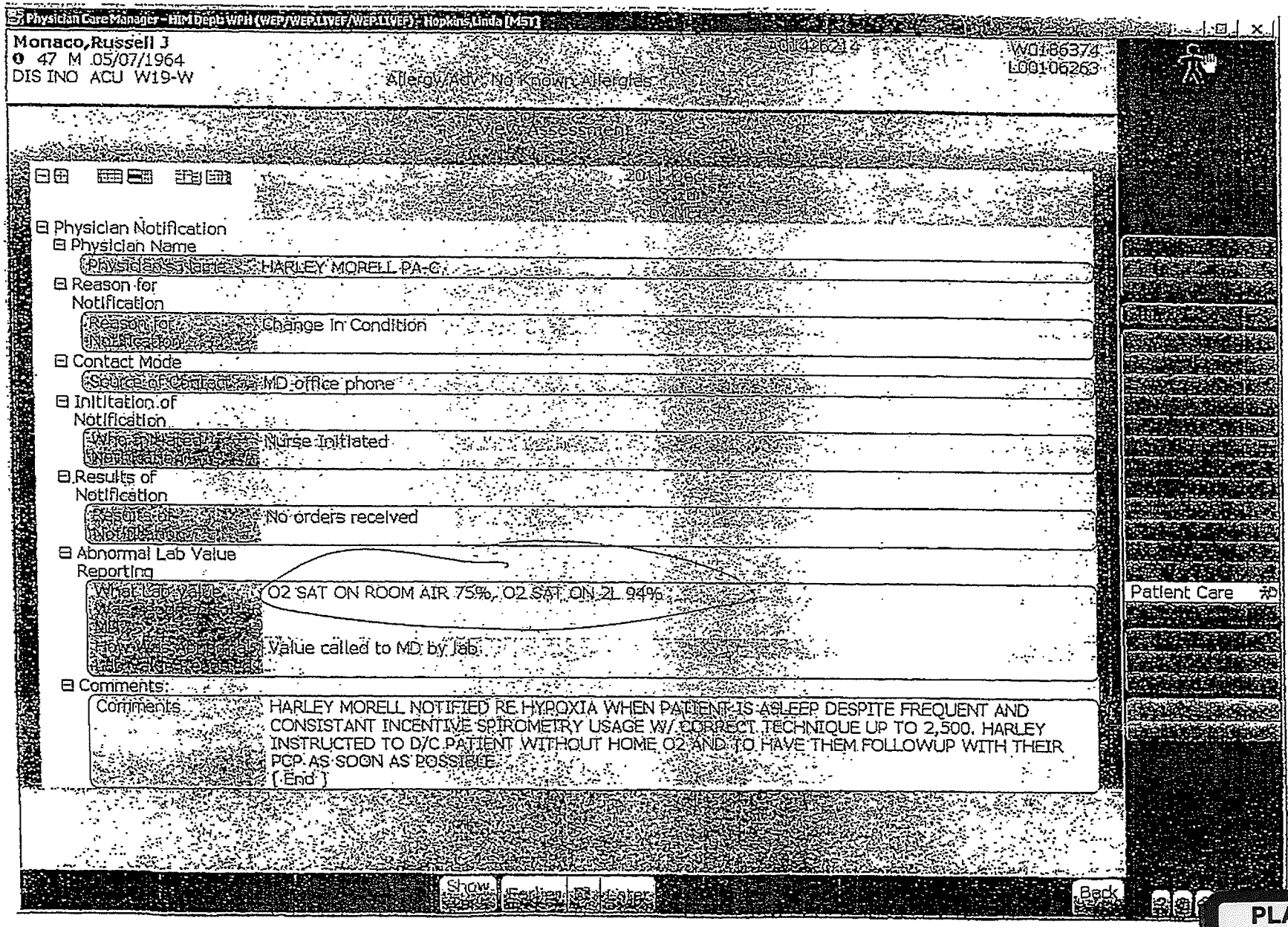
Ex. A-9

Patient: MONACO,RUSSELL J
Acct #: A01426214
Med Rec #: [f pt unit num
Report: Discharge Summary 1206-0034 continued

Imported Date/Time: 12/06/11 1411 MST

CC: SCHNEIDER MD,JOHN H ~

Ex. A - 10



USE NAME PLATE OR PRINT PATIENT ID HERE

MONACO,RUSSELL J
W0186374 47 M DOB: 05/07/1964
11/28/11Time 0923 A01426214
SCHNEIDER MD,JOHN H

PHYSICIAN'S ORDERS

Morphine

DRUG ALLERGIES

ANOTHER BRAND OF DRUG IDENTICAL IN FORM AND CONTENT MAY BE DISPENSED UNLESS CHECKED ☐ W19

Date & Time Ordered	ORDERS AND SIGNATURE	Signature of Physician and Nurse attending to order
12/1/11 0715	1) Discharge home today	[illegible]
	2) F/U [illegible]	
	3) [illegible] prior to discharge	
Scan T.S. 12-1-11 0730	[signature]	

PLAINTIFF'S EXHIBIT 9

D-025
[illegible] RECORD CO., BERWYN, ILLINOIS

PHYSICIAN'S ORDERS

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CHART COPY

PHYSICIAN'S ORDERS

ANOTHER BRAND OF DRUG IDENTICAL IN FORM AND CONTENT MAY BE DISPENSED UNLESS CHECKED ☐

DRUG ALLERGIES _____

.29h .5h

Date & Time Ordered	SCHNEIDER INPATIENT STANDING ORDERS	Page 1 of 1

Date: _____

Time: _____

1. 02 PRN to maintain 02 saturation equal to or greater than 90% or baseline.
2. May send promethazine (Phenergan) 25 mg suppository home with patient for nausea/vomiting.
3. Acetaminophen (Tylenol) 650 mg PRN temp greater than 101.0 or for pain. (Tylenol not to exceed 4000 mg/24 hours).
4. Dolasetron (Anzemet) 12.5 IVP one time for nausea/vomiting.
5. Diazepam (Valium) 2.5 to 5 mg IV every 6 hours PRN anxiety, muscle spasms
6. Cyclobenzaprine (Flexeril) 10 mg po every 8 hours PRN muscle spasms
7. Straight cath PRN
8. Cefazolin (Ancef) Gm 2 IVPB in pre op for back and neck surgery patients. IF the patient has had an anaphylactic reaction to Penicillin or cannot take cefaclor (Ceclor) or cephalexin (Keflex), give Vancomycin 500 mg IVPB.
9. Diphenhydramine (Benadryl) 25 to 50 mg every 6 hours IVP PRN itching/sleep.
10. Dexamethasone (Decadron) 10 mg IV every 6 hours PRN hypersensitivity.
11. If patient's O2 Saturation is 85% or less, send home on oxygen via nasal cannula to keep saturations greater than 90% and have them follow up with primary care doctor to discontinue oxygen when appropriate.

Physician Signature _____

DATE _____

SCHNEIDER INPATIENT STANDING ORDERS 3700-05500
Revised: 11/2011

West Park Hospital Cody, Wyoming

PLAINTIFF'S EXHIBIT 10

PHYSICIAN'S ORDERS

DRUG ALLERGIES _____

ANOTHER BRAND OF DRUG IDENTICAL IN FORM AND CONTENT MAY BE DISPENSED UNLESS CHECKED ☐

Date & Time Ordered	PHYSICIAN DISCHARGE ORDERS	Page 1 of 2

DATE/TIME 12/1/11 DESTINATION Home

DISCHARGE DIAGNOSIS S/P Incomplete Incision

DIET Reg FLUIDS Reg

ACTIVITY LEVEL:

☒ As Tolerated ☐ Bedrest for _____ ☐ Non-Strenuous

☐ Restricted:

☐ Non-weight Bearing on _____

☐ Toe-touch Weight Bearing _____% on _____

☐ No Bending of/from _____

☐ Weight Lifting Limit # _____ Pounds

☐ Other _____

FOLLOW UP APPOINTMENT:

Dr/PA/Nurse Wendy Wilson Dr/PA/Nurse _____ Dr/PA/Nurse _____

Location _____ Location _____ Location _____

Date/Time _____ Date/Time _____ Date/Time _____

☐ Fax Copy of this to my office

REFERRAL APPOINTMENTS:

☐ Rehab Services: _____ ☐ Home Health _____

☐ Hospice: _____ ☐ Dietician Referral _____

☐ Diabetic Educator _____ ☐ Home Oxygen _____

☐ Lab _____ ☐ Radiology _____

☒ Other Pat L. Wound Clinic

SYMPTOMS TO REPORT TO YOUR DOCTOR (CHECK ALL THAT APPLY)

☒ Redness, Swelling, Increased Drainage, or Unrelieved Pain at Incision Site

☒ Temperature Greater Than 101 Degrees (Fahrenheit)

☒ Chest Pain, Shortness of Breath

☒ Nausea / Vomiting

☒ Return of Symptoms Responsible for This Hospital Visit

☒ Any Questions of Concern

☐ Other _____

Noted MTG/Wound 12-5-11 0850

EXHIBIT tabbies PLAINTIFF'S EXHIBIT 11

Scan 12-1-11 0745

MONACO, RUSSELL J
M01426214 47 M 05/07/64
11/28/11 0923
SCHNEIDER MD, JOHN W0186374

Physician Signature _____

Date / Time 12/1/11 0745

Ex. C WPH 51

WestPark

PHYSICIAN'S ORDERS

DRUG ALLERGIES _____

ANOTHER BRAND OF DRUG IDENTICAL IN FORM AND CONTENT MAY BE DISPENSED UNLESS CHECKED ☐

Date & Time Ordered	PHYSICIAN DISCHARGE ORDERS	Page 2 of 2

WOUND CARE/DRESSING PROCEDURE CARE:

☐ Not applicable

☐ Change Dressing as Needed

☐ Remove Dressing in ____ Hours Or in ____ Days

☐ Ice/Cryocuff On ____ Off ____

☐ CPM On _____ a Day to _____ Degrees

☐ May Shower/Bathe on _____

☐ IV/Tube Care _____

☐ Keep Dressing Dry & Intact Until Seen in MD Office

☐ Do Not change or Remove Dressing – Only Reinforce as Needed

☐ Elevate _____ Above Heart _____ Hours

☐ Return On _____ for Drain Removal

☐ Compression Stockings to be Worn with Ankle Brace

SPECIAL EQUIPMENT:

☐ CPM _____

☐ Crutches

☐ Bedside Commode

☐ Bath Bench – Regular / Extended

☐ Oxygen _____

☐ Cryocuff On _____ Off _____ Until _____

☐ Wheelchair

☐ Walker: Type _____

☐ Toilet Riser

☐ Other _____

Physician Signature _____

Date / Time _____

NOKA Rehab 12-1-11 @ 0800

MONACO, RUSSELL J
M01426214 47 M 05/07/64
11/28/11 Time 0923 W0186374
SCHNEIDER MD, JOHN

WestPark

PLAINTIFF'S EXHIBIT

WPH 164

Ex. C - 52

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF WYOMING

ESTATE OF RUSSELL MONACO, BY AND THROUGH KATHY MONACO, WRONGFUL DEATH REPRESENTATIVE AND PERSONAL REPRESENTATIVE, AND KATHY MONACO, INDIVIDUALLY AND ON BEHALF OF MINOR CHILDREN,

Plaintiffs,

vs.

HARLEY G. MORRELL, PA-C, JOHN SCHNEIDER, JR., M.D., NORTHERN ROCKIES NEURO-SPINE, P.C., a Wyoming Corporation, WEST PARK HOSPITAL DISTRICT, WEST PARK HOSPITAL, QUORUM HEALTH RESOURCES, LLC, a Delaware Corporation, AND JOHN DOES 1 THROUGH 10,

Defendants.

Case No: 13-CV-1518

DEPOSITION

OF

KATHY MONACO

Held at Suite 1710
1st Interstate Bank Building
401 N. 31st Street
Billings, MT 59101
October 29, 2014
10:09 a.m.

RICHARD L. MATTSON, LTD.,
CERTIFIED COURT REPORTER
816 Avenue F
Billings, MT 59102
(406) 698-3163

APPEARANCES

For the Plaintiffs: MR. JON M. MOYERS
Moyers Law, PC
490 N. 31st Street, Suite 101
Billings, MT 59101

For the Defendants:, MR. STEPHENSON D. EMERY
Williams, Porter, Day & Neville, PC
P.O. Box 10700
159 North Wolcott, Suite 400
Casper, WY 82602

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Whereupon,

KATHLEEN MONACO,

having been first duly sworn, was examined and testified as follows:

EXAMINATION

10:09:29 Q (By Mr. Emery:) Good morning.
A **Hi.**
Q Please state your full name for the record and spell your last name.
10:09:35 A **Kathleen Monaco, K a t h l e e n, M o n a c o.**
Q Where do you live?
A **4158 Banebridge Circle.**
Q How do you spell Banebridge?
10:09:55 A **B a n e b r i d g e, one word.**
Q Where is that?
A **Off of 41st and Shiloh, Central.**
Q In Billings?
A **Billings.**
10:10:05 Q What's the zip code?
A **59106.**
Q What type of residence is that?
A **It's a duplex.**
Q How long have you lived there?
10:10:17 A **A year and four months.**

Q Who do you live there with?
A **My two daughters.**
Q Anybody else?
A **No.**
10:10:33 Q Do you own or rent?
A **Rent.**
Q Is this the second deposition you've given?
A **Yes.**
10:10:45 Q The first one was in the Board of Medicine case?
A **Yes.**
Q Do you remember giving that deposition?
A **I do.**
10:10:53 Q It was on July 23rd, 2012, do you recall that?
A **Yes.**
Q And that was the first deposition you had ever given?
10:11:13 A **Yes.**
Q And this is now the second?
A **Correct.**
Q And you recall you were under oath at that deposition, don't you?
10:11:21 A **Yes.**

PLAINTIFF'S EXHIBIT 12

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Q Did he need help getting from the bed to the wheelchair or from the wheelchair to the car?
A **I don't know about the bed to the wheelchair because I had left to get the car, but from the wheelchair to the car she helped him.**
Q She being Nurse --
A **Micaleen.**
Q What kind of car?
A **Ford Explorer.**
Q And did he ride -- well, strike that. Who drove?
A **I did.**
Q Where did he sit?
A **In the passenger seat in the front because it reclined back somewhat.**
Q Did he recline it?
A **Yes.**
Q And so this was about 10 a.m.?
A **Yes.**
Q From there where did you go?
A **Straight home.**
Q You drove to Billings?
A **Yes.**
Q To the Glantz residence?

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A **Yes.**
Q How long did that take?
A **Hour and a half, two hours.**
Q What route did you go?
A **I have no idea. My little navigation thing said home and it told me where to turn. I went through Belfry.**
Q You didn't come through Sheridan, didn't go that way?
A **No.**
Q So you said it took how long, hour and a half?
A **Yeah, hour and a half-ish.**
Q So you got home at what time, roughly?
A **Probably 1:30, 12.**
Q And you never saw him after he left the hospital using the spirometer, right?
A **No, I did not.**
Q So he didn't use it on the way home?
A **No, he slept the whole way home.**
Q Did you have any conversation with him in the car on the way home?
A **Only when I hit a couple icy patches, I said, oh my God, it's icy, and he said, yeah, be careful. That's about it.**

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Q How did he appear to you when he was awake? Was he coherent?
A **When he was talking to me, yes.**
Q Was it, again, the situation where you really couldn't keep him awake?
A **Well, I didn't really try to keep him awake. I just was concentrating on my driving.**
Q So you weren't trying to talk to him and keep him talking kind of thing?
A **No.**
Q You let him sleep?
A **Yes.**
Q Did he ever say anything to you during that morning, whether it be in the hospital or during the drive home, where he said, I can't stay awake, I'm trying to stay awake, but my eye lids are too heavy, or something like that?
A **Not that I remember.**
Q What did you do when you got home?
A **I helped him walk in and sat him in the recliner.**
Q Did he have to walk upstairs?
A **No. The family room is on the main floor. You just walk right in from the garage.**
Q So you were able to pull into your

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garage and get him in through the door to the garage?
A **Yes.**
Q And he went to his chair?
A **Just a recliner we have in the family room.**
Q It wasn't his chair?
A **No. It was just a recliner, so he could recline his feet up instead of sitting on the couch.**
Q Did he have lunch?
A **I fixed him something but he didn't eat it.**
Q What did he do once he got in the chair for the next couple of hours, if anything?
A **Nothing.**
Q Did he sleep?
A **Yes.**
Q Was he asleep the entire time until -- you said you went to fill the prescriptions at what time?
A **As soon as I got home. Russ's mother stayed with him until I got back from the pharmacy.**
Q Okay. So let me figure out when that

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was. You fixed -- you got home, say, 11:30, 12 noon, right?
A Right.
Q And was Russ's mom there?
16:19:53 **A Yes.**
Q And then you said that you fixed him something that he didn't eat?
A Well, I went to Target and got the prescriptions first. Came home. Judy left. And
16:20:04 **then I made him something to eat. Couldn't tell you what it was, but he didn't eat it.**
Q So how long after you got home did you go to fill these prescriptions?
A Right as soon as I pretty much got him
16:20:20 **in the house. I was exhausted, his mother was exhausted. She wanted to get home.**
Q Do you know what time that was?
A What time what?
MR. MOYERS: When you went to Target.
16:21:19 Q (By Mr. Emery:) And filled the prescription.
A Between 12 and 12:30.
Q And you said it took about 20 minutes to fill?
16:21:39 **A Yeah.**

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Q And how long does it take to get to the pharmacy from your house?
A Five minutes.
Q By car?
16:21:48 **A Yes.**
Q So you drove there, it was about 20 minutes or so that you were there, and then you went straight back?
A Yes.
16:21:55 Q So you were gone a little under an hour?
A Yes.
Q So you would have gotten back to the house around, what, a little after 1 p.m.?
A Probably around there.
16:22:16 Q At that point in time Judy left?
A Yes.
Q Did she -- did you have a pat down of Russ's observation while you were gone? Did she tell you what happened?
16:22:27 **A She said all he did was sleep the whole time she was there.**
Q Did she recount any conversation that she had with him?
A No, not that I remember.
16:23:01 Q Did you give him any medications from

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what you filled when you got back home?
A I did. I believe I gave him two of them in the afternoon around 2:30.
Q You said you gave him two --
16:23:44 **A I'm not even sure which one it was, if it was Dilaudid or Percocet.**
Q Why did you give him those medications?
A Because they told us to keep up on top of the pain. Don't let it get bad before you
16:24:12 **give him pain medication.**
Q Who told you that?
A Harley.
Q When?
A I don't know. Maybe he didn't tell me.
16:24:22 **I guess just from hearing it in the office. Whenever I've had surgery, that's what they've said, make sure you keep on top of the pain.**
Q Now, in your prior deposition you said that you gave him two Dilaudid at 2:30 or 3 p.m.
16:24:49 Are we talking about the same thing?
A Yes.
Q So you're not talking about you gave him two either Dilaudid or Percocet at 1:30 p.m. and gave him another round at 2:30 or 3?
16:25:03 **A No.**

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Q It's the same thing.
A I'm just not sure if it was the Dilaudid or Percocet that I gave him at 2:30, because they are both for pain.
16:25:12 Q Had you given him any medication that day prior to what we are talking about just now, whether it be at 1:30 or 2:30 or 3?
A No.
Q Had he obtained any narcotic medication
16:25:32 prior to that to your knowledge?
A No.
Q Did you see Nurse Fulkerson or any other hospital personnel give him any pain meds that morning?
16:25:44 **A I don't remember.**
Q Did he have an IV still going?
A Yes.
Q Do you recall nurses coming in and fooling around with the IV at all?
16:25:53 **A I don't remember.**
Q And you don't recall them coming in and saying, I'm giving him whatever, in the IV, as a pain med?
A No, I don't remember.
16:26:05 Q Are you saying it didn't happen or you

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just don't remember?
A **I just don't remember.**
Q After you gave him the pain meds -- and I think you've said before in deposition, and you also wrote a letter to the BOM, that it was Dilaudid. Why are you now not sure it was Dilaudid?
A **I just remember it being a pain pill. I don't know which one it was.**
Q But you remember it was two?
A **Yes.**
Q Do you remember what it looked like?
A **No idea.**
Q Have you seen the autopsy results?
A **Yes.**
Q And are you aware that there wasn't any Dilaudid found in his system, in his blood?
A **I read through it two and a half years ago. I don't remember what I read.**
Q Are you aware or not that that Dilaudid was found in his blood?
A **I was not aware that it was or wasn't.**
Q Did you read these prescriptions?
A **Not those ones.**
Q What was it -- I mean, by that I mean,

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obviously, the particular drug and the quantity of the drug is indicated on here, but what I'm wondering about is how often and what quantities you're supposed to take them. Did you read those instructions?
A **On the bottle I did.**
Q For example, I'm assuming -- do you still have those bottles?
A **No, the coroner took them.**
Q Here is the back side of the prescription of all three of them, but I'm looking at the one for the Percocet. Yeah, for the Percocet. And it says, take one to two tablets by mouth every four to six hours as needed for pain. That's what you're talking about?
A **Yes.**
Q Do you know whether this same information was on the bottles?
A **It was.**
Q And I take it there was a separate bottle for each of these medications, except for the patches?
A **Yes. Patches came in a box.**
Q So what did you do after you gave him

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those medications?
A **I went and picked up my daughter from school.**
Q Did you see him take the meds?
A **Yes.**
Q How did he take them?
A **Stuck them in his mouth and took a drink of water.**
Q Did you give him the water?
A **Yes.**
Q Did he get up to assist at all in that?
A **No.**
Q He was in the chair the whole time?
A **Yes.**
Q So you brought him the medications together with the water?
A **Yes.**
Q And you actually physically witnessed him take both?
A **Yes.**
Q Did you ever again administer medications to him?
A **Not that I recall.**
Q You testified before that you left --
A **I left two of them on the table next to**

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him in case he needed them during the night.
Q At what time did you do that?
A **When I went to bed, about 9:30.**
Q But you did not see him take those meds?
A **No.**
Q Do you know what it was that you left there?
MR. MOYERS: She did not see him take those meds. Important point. You said it in a negative and she answered in a negative. What's your next question? I'm sorry.
MR. EMERY: Thank you for clarifying.
Q (By Mr. Emery:) Did he clarify it correctly?
A **Yes.**
Q What were the medications that you left there for him to take?
A **Must have been the Percocet, pain medicine.**
Q Well, you said Dilaudid before, which is different than Percocet, right?
A **Yes.**
Q Why are you saying Percocet now and you said Dilaudid before?

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Q So I'm not exactly sure what counsel is saying. Are you saying because he was having difficulty walking that there's no possibility that he could have gotten them from the kitchen?

16:42:49 **A I'm saying he couldn't even walk five steps from the recliner to the couch without me helping him, let alone walk 20 feet, go up eight stairs and walk to the kitchen counter by himself and make it back down.**

16:43:06 Q So the kitchen is upstairs?

A Yes.

Q How many?

A Probably eight stairs.

Q And they it's further up to your

16:43:18 bedrooms?

A Then it's probably ten stairs up. It was a four-level house.

Q Were all of these drugs that were recovered by the coroner's folks in that same

16:43:49 location in the kitchen?

A Yes, I believe so. My brother-in-law gathered them all up, put them in a box. When the coroner got there they were all together in a box.

16:44:01 Q Had they asked you to do that?

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A No. Rob just wanted them out of the house.

Q Why?

A Because his brother just died.

16:44:12 Q How did he know from what he died?

A He didn't know. He just didn't want, like, his glasses were sitting on the desk, you know, his crutches were sitting there. He died with his hand through a crutch, which is exactly

16:44:26 **the way he was when I left him. Hadn't even moved an inch.**

Q Really. That same --

A The exact same. Helped him walk to the couch, he had the crutch here with his arm

16:44:40 **through it, and that's the way he was in the morning dead.**

Q And that was at 9:30 p.m. when you saw him in that...

MR. MOYERS: A nod is not a yes.

16:44:51 THE WITNESS: Yes.

Q (By Mr. Emery:) You did not come down -- you did not see him again after that?

A After I went to bed, no.

Q Didn't come down two hours later to see

16:45:03 how he was doing?

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A I left him the cell phone and told him if he needed anything to call me. He didn't want me to stay down there. He wanted me to get some sleep.

16:45:11 Q The question was, did you go down and see him after that?

A I did not.

Q At any time?

A I did not.

16:45:19 Q He did not call you?

A No.

Q Did you look at your cell to see if he called?

A I did, and I would have heard it.

16:45:25 Q No possibility that it was on mute or anything like that?

A No.

Q Did you check then?

A I never had my phone on mute because I

16:45:33 **can't hear it.**

Q Did you check after at any time since December 1st, 2011, whether your cell phone had been called by his?

A No.

16:45:48 MR. MOYERS: You mean check with the

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phone company?

Q (By Mr. Emery:) No, check to see if you missed a call.

A You want me to check to see if I missed

16:45:58 **a call. If I would have, it would have said, missed call, when I went to look at it.**

Q That's what I'm asking. You didn't see that?

A No. I mean, I didn't wake up and say,

16:46:10 **did Russ call? No.**

Q Or the next morning, did you look at your phone and say, oh, he called at 2 a.m. and I was asleep, or something like that?

A There was no call.

16:46:19 Q When did you check it?

A When I woke up.

Q What time did you wake up?

A I don't know, 6, 6:30.

Q Did you file a complaint against Harley

16:47:49 with the Wyoming Board of Medicine?

A I don't remember if I did or not.

Q What time did you find your husband on the couch?

A As soon as I got up, which was either 6

16:48:25 **or 6:30. Mallory has the guilt of seeing him**

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sitting there thinking he was just asleep and thinking, if I were to call for help, maybe he would still be here. She lives with that guilt every day.

16:48:44 Q Guilt about not thinking that he was asleep?

A She just thought he was asleep and she thinks if she would have called 911, he might still be here.

16:48:54 Q You have disavowed her of that?

A Oh, definitely.

Q Because --

A Because I did the same thing, I walked right by him to go upstairs to get her up and

16:49:04 **make sure she was out of bed. I thought he was just sleeping until I saw that he was blue and hadn't moved.**

Q Was there any indication that he had moved at all from when you had last seen him?

16:49:19 **A No, he was in the exact same position.**

Q So is it your belief that he died within minutes after 9:30 p.m.?

MR. MOYERS: Foundation.

A I can't say that, but I would assume it

16:49:35 **wasn't too long after that. I mean, he was**

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already --

MR. MOYERS: Don't assume. It was a medical fact. It wasn't shortly after 9:30. Don't make a guess you unless you actually know,

16:49:46 Kathy.

THE WITNESS: I don't know.

Q (By Mr. Emery:) Did you make complaint to the Wyoming Board of Medicine about John Schneider in relation to your husband's death?

16:50:08 **A No.**

Q So you couldn't remember if you did it against Harley but you do remember that you didn't do it against John, am I understanding that correctly?

16:50:25 MR. MOYERS: We didn't file with the Board of Medicine. It was the Medical Review Panel.

THE WITNESS: I didn't file anything with the Board of Medicine. They contacted me.

16:50:41 Q (By Mr. Emery:) Do you know who made the complaint to the Wyoming Board of Medicine?

A No.

Q Was it anybody in his family?

A In Russ's family? I don't know.

16:50:53 Q Has anybody from his family told you

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that he or she complained to the Wyoming Board of Medicine?

A No.

MR. MOYERS: Do you know the answer to

16:51:09 that question?

MR. EMERY: I do not.

MR. MOYERS: I need to take a little break before 5 o'clock. It's ten till.

(Recess.)

17:00:03 Q (By Mr. Emery:) As a result of the conversations did either you or Becky Cinceros of EBMS, you were aware prior to when Dr. Schneider did the surgery that he did on your husband that he would be considered an out of network

17:00:30 provider?

A Yes.

Q Which means that you would have to pay more for him and his services than if he was an in network provider?

17:00:40 **A That's correct. And I understood that, Russ understood that, but we wanted Dr. Schneider to do the surgery. I have gone out of network to have surgery for myself, paid extra out of my pocket, worth it in my book to have somebody you**

17:00:55 **trust do surgery for you versus somebody you**

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don't know.

Q And you trusted Dr. Schneider?

A Yes.

Q And I know you said at your deposition

17:01:13 that neither you nor your husband wanted Dr. Dolan to do the surgery.

A Right.

Q And you said something about he was old at the time he had done the first surgery so he

17:01:24 must be really old?

A Well, he's older now, yes. He seemed old. Maybe he just looked old, I don't remember, but...

Q Was there any other reason why you

17:01:34 didn't want Dolan to do it?

A We wanted Dr. Schneider to do it. I worked for him for four years.

Q Was your husband dissatisfied with the surgery that Dolan had done?

17:01:49 **A No, actually he did quite well with that surgery.**

MR. EMERY: Those are all my questions. Thank you.

MR. MOYERS: Kathy I just have a few

17:04:08 questions in follow up, and we will reserve the

Thomas L. Bennett, M.D.
Forensic Medicine and Pathology

September 26, 2012

Fred Paoli, Jr., Attorney at Law
Bogue and Paoli, LLC
1401 17th Street, Suite 320
Denver, CO 80202

RE: F12-27, Death of Russell J. Monaco, (My case ME11-306)

Dear Mr. Paoli:

Thank you for the opportunity to work with you on the above case. As you know, I performed the autopsy on Mr. Monaco on 12-2-11, and then was deposed by the Wyoming Board of Medical Examiners on this case on 8-28-12. I am a Board-certified Pathologist, certified in the areas of anatomic pathology, clinical pathology and forensic pathology since 1983, and am licensed to practice medicine in Montana and Wyoming. I have performed over ten thousand forensic autopsies, and I have testified in federal and state courts in the majority of the states and even internationally. My opinions offered in the autopsy report, deposition and in this letter all reflect my training, experience, research into the literature and consultations on deaths.

As stated in the deposition, and as described in the autopsy report, Mr. Monaco underwent surgery at the West Park Medical Center in Cody, Wyoming, during his hospitalization from 11-28-11 through 12-1-11. The surgery was on his lumbar spine for herniated discs, the surgery performed apparently well, with no complications of the actual surgery found during the hospitalization or at the autopsy. Mr. Monaco was obese, and had a long history of pain complaints. At the autopsy, the surgical site and margins were clean and early-healing. In my opinion, Mr. Monaco got through the surgery well and did not die as a result of his surgery.

Mr. Monaco was discharged from the West Park Hospital on the morning of 12-1-11, with the following prescriptions:

1. Fentanyl patches (Duragesic 50 ug/hr patches – 5 patches dispensed);
2. Dilaudid (Hydromorphone/hydrochloride) 4 mg tablets – 90 pills dispensed;
3. Oxycodone/acetaminophen (Percocet) 7.5 – 325 mg pills – 120 dispensed; and
4. Valium (Diazepam) 5 mg tablets – 90 pills dispensed.

These medications were picked up on 12-1-12.

Mr. Monaco was also given a 50 mg injection of Demerol (meperidine) and a 25 mg injection of Phenergan (promethazine) for pain and nausea, respectively, while hospitalized. The first fentanyl patch (not one of the five above-mentioned prescribed and dispensed patches) was put onto his left shoulder while at the hospital on 11-30-11, and per the markings on the patch was applied at 0812 that morning.

On the evening of 12-1-11, Mr. Monaco was sitting on the couch at home, his wife seeing him alive and giving him his last medications at approximately 2230. She found him at about 0600 the following morning, slumped while seated on the sofa, where he was pronounced dead. The autopsy was performed the following day.

Forensic Medicine and Pathology, PLLC
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At the autopsy, Mr. Monaco was obese and had mild enlargement of his heart, but had no other significant underlying disease process found at the autopsy to explain his death. The records describe that he had some of the symptoms of sleep apnea described, but he had not been given that diagnosis. From the note of Dr. Schneider, he apparently was aware that Mr. Monaco may have had symptoms of sleep apnea, although it had not been diagnosed. Mr. Monaco had been having low oxygen saturations after starting the Fentanyl patch (e.g., pO2 of 75 on the date of discharge), while on the Fentanyl patch.

Mr. Monaco died as a result of his postoperative care, namely the overmedication he received. In my opinion, Mr. Monaco died as a direct result of the severe respiratory depression resulting from the combination of the many medications he received. These narcotics and benzodiazepines are central nervous system depressants, the narcotics especially having warnings of the risk of respiratory depression. He did not die from one of the medications, but rather as a result of the combined effects of all the medications on his body. From all appearances, Mr. Monaco took the pills exactly as prescribed.

I hold all these opinions to a reasonable degree of medical certainty. If additional information becomes available that has a bearing on these conclusions, these conclusions will be amended or supplemented appropriately. Please let me know if there is anything more I can do or need to provide.

Sincerely,

Thomas L. Bennett, M.D.

Thomas L. Bennett, M.D.
Forensic Pathologist

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John Schneider, Jr., M.D., and
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IN THE UNITED STATED DISTRICT COURT
DISTRICT OF WYOMING

ESTATE OF RUSSELL MONACO, BY AND THROUGH KATHY MONACO, WRONGFUL DEATH REPRESENTATIVE AND PERSONAL REPRESENTATIVE, AND KATHY MONACO, INDIVIDUALLY AND ON BEHALF OF MINOR CHILDREN,	)	
Plaintiffs,	)	Case No.: 13-CV-151S
vs.	)	
HARLEY G. MORRELL, PA-C, JOHN SCHNEIDER, JR., M.D., NORTHERN ROCKIES NEURO-SPINE, P.C., a Wyoming Corporation, WEST PARK HOSPITAL DISTRICT, WEST PARK HOSPITAL, QUORUM HEALTH RESOURCES, LLC, a Delaware Corporation, AND JOHN DOES 1 THROUGH 10	)	
Defendants.	)	

AFFIDAVIT OF JOHN H. SCHNEIDER, JR., MD
IN OPPOSITION TO JOINT MOTION FOR CONSENT JUDGMENT

1. This *Affidavit of John H. Schneider, Jr., M.D. in Opposition to Joint Motion Consent Judgment* is made to support Defendants' response in opposition to the motion.

2. I am a board certified, spine fellowship trained, neurosurgeon who has practiced in Wyoming since October 1997.

3. As a neurosurgeon, I treated complex spinal degenerative conditions and performed reconstructive spine surgeries.

4. My practice included extensive experience with the care and management of complex high demand pain patients for whom I performed both pain management surgeries and medical pain management.

5. Harley A. Morrell, PA-C entered into an employment contract from 2009-2010 with Northern Rockies Neuro-Spine (NRNS) that defined expectations and parameters of his practice with NRNS.

6. Morrell practiced under his own licensure and was expected to practice within standards of care relative to that license.

7. Morrell saw patients, interpreted x-rays, and wrote prescriptions independent of my knowledge, reviewing with me only pertinent issues regarding patient communication and physical exam findings.

8. Morrell only acted as an agent and employee for me when his actions did not violate acceptable standards of medical care, specific protocols in place for the practice, and was not insubordinate to my direct orders.

9. I exert control over medical decision making in my practice by creating detailed protocols to avoid over medication or misapplication of medications for my patient population.

10. A postoperative medication protocol, a copy of which is attached as Exhibit 1, does not allow for the prescription of both Dilaudid and fentanyl at discharge. Monaco's use of postoperative oral medications in addition to fentanyl patch, other than a periodic Percocet for breakthrough pain, was against the medication protocol, and Morrell violated this protocol without my knowledge.

11. Morrell was both aware of and practiced within these guidelines.

12. Morrell voluntarily resigned his position with NRNS on January 28, 2012.

13. As owner of NRNS, I contest the assertions of Morrell that he was acting within the scope of his employment by me at all times during his care of Monaco.

14. Morrell disobeyed my standing orders, failed to follow my procedures and protocols in prescribing medications, acted outside the scope and bounds of his employment, and contravened my instructions in the treatment and care of Monaco.

15. Morrell's care and management of Monaco directly violated the protocols that delineate appropriate medications for every NRNS patient at the time of discharge.

16. I wrote discharge orders for Monaco and Morrell prescribed him with Percocet and Valium for postoperative pain control the morning of November 29, 2011.

17. Monaco's discharge was canceled for November 29th, and he was converted to in-patient status.

18. I found Monaco asleep at 3 p.m. on November 30th without supplemental oxygen. His oxygen saturation level was at 92%. I woke Monaco and proceeded to discuss multiple aspects of his post-operative care for over thirty minutes.

19. Mrs. Monaco, Morrell, and Nurse Fulkerson, Monaco's primary nurse provider during the dayshift, were also present for part of this conversation.

20. I discussed with Mr. and Mrs. Monaco at length the expectation of considerable pain following extensive back surgery, the need for mobilization, and the high risk of multiple narcotics causing respiratory suppression.

21. I informed Monaco that his home use of prescriptions received on November 29, 2011 should be limited to the fentanyl patch with no more than a periodic Percocet for breakthrough pain.

22. On December 1, 2011, Morrell wrote out additional prescriptions for Dilaudid, Percocet, Valium and fentanyl patches, giving the prescriptions directly to Monaco and making no note in the orders or discharge paperwork regarding these additional medications.

23. In addition to the continued transdermal fentanyl patch, the only other medication that Morrell ordered appearing in the medical records was a single Demerol/Phenergan injection at discharge.

24. Morrell did not notify me of additional medications given to Monaco at the time of discharge.

25. This direction by Morrell violated the medication discharge protocol in force and practiced by all medical providers at NRNS.

26. Morrell violated this postoperative medication protocol without my knowledge.

27. Morrell further violated protocols of NRNS, outside the scope of his employment, when he failed to document critical prescription information in the electronic medical records owned by NRNS, following discharge of patient Monaco, preventing all employees and providers of NRNS the critical information and knowledge about patient Monaco required for the continuity of patient care in the practice.

28. I never saw any evidence of the additional prescriptions written by Morrell on December 1, 2011 and anticipated Monaco would follow his orders, restricting home medications for pain to the fentanyl patch and the one Percocet every 8 hours for acute breakthrough pain.

29. Morrell further violated standards of care and practice protocols by authorizing the discharge of a medically unstable patient following nursing communication to Morrell of a dangerous hypoxemia at 9 a.m. on December 1, 2011.

30. Morrell's failure to report this critical vital sign event to me confirms he was not acting as an agent, representative or employee of NRNS at the time of his care and management of patient Monaco.

31. A NRNS protocol, a copy of which is attached as Exhibit 2, requires all patients at discharge to have oxygen saturation of greater than 90% or to be discharged home on supplemental oxygen.

32. Morrell ignored the critical value of low oxygen vital signs and authorized the discharge of this patient.

33. Regarding the *Consent Judgment-Harley Morrell*, which is attached to the *Memorandum in Support of Joint Motion for Entry of Consent Judgment* [ECF No. 48], I never gave Morrell the authority to bind me or to enter into any agreement on my behalf with the Plaintiffs in this lawsuit.

34. I was not consulted about their agreement.

35. I have not agreed to any of its terms, conclusions, or damages as claimed.

36. I do not join in their agreement.

FURTHER, AFFIANT SAYETH NAUGHT.

4.1.2014

John K Schneider, Jr. MD

John H. Schneider, Jr., M.D.

STATE OF MONTANA)
) ss.
COUNTY OF YELLOWSTONE)

On this _____ day of April, 2014, before me _____ Notary Public, personally appeared John H. Schneider, Jr., MD, who proved to be the basis of satisfactory evidence to be the person whose name is subscribed to the within instrument and acknowledged to me that he/she executed the same in his/her authorized capacity, and that by his/her signature on the instrument the person, or the entity on behalf of which the person acted, executed this instrument.

I certify under PENALTY OF PERJURY under the laws of the State of _____ that the foregoing paragraph is true and correct.

WITNESS my hand and official seal.

_____
Notary Public (Seal)

My commission expires: _____

Stephenson D. Emery, W.S.B. #5-2321
WILLIAMS, PORTER, DAY & NEVILLE, P.C.
P.O. Box 10700
159 North Wolcott, Suite 400
Casper, Wyoming 82602
307-265-0700 (telephone)
307-266-2306 (telefax)
Attorney for Defendants
John Schneider, Jr., M.D., and
Northern Rockies Neuro-Spine, P.C.

IN THE UNITED STATED DISTRICT COURT
DISTRICT OF WYOMING

ESTATE OF RUSSELL MONACO, BY AND THROUGH KATHY MONACO, WRONGFUL DEATH REPRESENTATIVE AND PERSONAL REPRESENTATIVE, AND KATHY MONACO, INDIVIDUALLY AND ON BEHALF OF MINOR CHILDREN,	)	
Plaintiffs,	)	Case No.: 13-CV-151S
vs.	)	
HARLEY G. MORRELL, PA-C, JOHN SCHNEIDER, JR., M.D., NORTHERN ROCKIES NEURO-SPINE, P.C., a Wyoming Corporation, WEST PARK HOSPITAL DISTRICT, WEST PARK HOSPITAL, QUORUM HEALTH RESOURCES, LLC, a Delaware Corporation, AND JOHN DOES 1 THROUGH 10	)	
Defendants.	)	

AFFIDAVIT OF JOHN H. SCHNEIDER, JR., MD
IN OPPOSITION TO JOINT MOTION FOR CONSENT JUDGMENT

1. This *Affidavit of John H. Schneider, Jr., M.D. in Opposition to Joint Motion Consent Judgment* is made to support Defendants' response in opposition to the motion.

2. I am a board certified, spine fellowship trained, neurosurgeon who has practiced in Wyoming since October 1997.

PLAINTIFF'S EXHIBIT 15

3. As a neurosurgeon, I treated complex spinal degenerative conditions and performed reconstructive spine surgeries.

4. My practice included extensive experience with the care and management of complex high demand pain patients for whom I performed both pain management surgeries and medical pain management.

5. Harley A. Morrell, PA-C entered into an employment contract from 2009-2010 with Northern Rockies Neuro-Spine (NRNS) that defined expectations and parameters of his practice with NRNS.

6. Morrell practiced under his own licensure and was expected to practice within standards of care relative to that license.

7. Morrell saw patients, interpreted x-rays, and wrote prescriptions independent of my knowledge, reviewing with me only pertinent issues regarding patient communication and physical exam findings.

8. Morrell only acted as an agent and employee for me when his actions did not violate acceptable standards of medical care, specific protocols in place for the practice, and was not insubordinate to my direct orders.

9. I exert control over medical decision making in my practice by creating detailed protocols to avoid over medication or misapplication of medications for my patient population.

10. A postoperative medication protocol, a copy of which is attached as Exhibit 1, does not allow for the prescription of both Dilaudid and fentanyl at discharge. Monaco's use of postoperative oral medications in addition to fentanyl patch, other than a periodic Percocet for breakthrough pain, was against the medication protocol, and Morrell violated this protocol without my knowledge.

11. Morrell was both aware of and practiced within these guidelines.

12. Morrell voluntarily resigned his position with NRNS on January 28, 2012.

13. As owner of NRNS, I contest the assertions of Morrell that he was acting within the scope of his employment by me at all times during his care of Monaco.

14. Morrell disobeyed my standing orders, failed to follow my procedures and protocols in prescribing medications, acted outside the scope and bounds of his employment, and contravened my instructions in the treatment and care of Monaco.

15. Morrell's care and management of Monaco directly violated the protocols that delineate appropriate medications for every NRNS patient at the time of discharge.

16. I wrote discharge orders for Monaco and Morrell prescribed him with Percocet and Valium for postoperative pain control the morning of November 29, 2011.

17. Monaco's discharge was canceled for November 29th, and he was converted to in-patient status.

18. I found Monaco asleep at 3 p.m. on November 30th without supplemental oxygen. His oxygen saturation level was at 92%. I woke Monaco and proceeded to discuss multiple aspects of his post-operative care for over thirty minutes.

19. Mrs. Monaco, Morrell, and Nurse Fulkerson, Monaco's primary nurse provider during the dayshift, were also present for part of this conversation.

20. I discussed with Mr. and Mrs. Monaco at length the expectation of considerable pain following extensive back surgery, the need for mobilization, and the high risk of multiple narcotics causing respiratory suppression.

21. I informed Monaco that his home use of prescriptions received on November 29, 2011 should be limited to the fentanyl patch with no more than a periodic Percocet for breakthrough pain.

22. On December 1, 2011, Morrell wrote out additional prescriptions for Dilaudid, Percocet, Valium and fentanyl patches, giving the prescriptions directly to Monaco and making no note in the orders or discharge paperwork regarding these additional medications.

23. In addition to the continued transdermal fentanyl patch, the only other medication that Morrell ordered appearing in the medical records was a single Demerol/Phenergan injection at discharge.

24. Morrell did not notify me of additional medications given to Monaco at the time of discharge.

25. This direction by Morrell violated the medication discharge protocol in force and practiced by all medical providers at NRNS.

26. Morrell violated this postoperative medication protocol without my knowledge.

27. Morrell further violated protocols of NRNS, outside the scope of his employment, when he failed to document critical prescription information in the electronic medical records owned by NRNS, following discharge of patient Monaco, preventing all employees and providers of NRNS the critical information and knowledge about patient Monaco required for the continuity of patient care in the practice.

28. I never saw any evidence of the additional prescriptions written by Morrell on December 1, 2011 and anticipated Monaco would follow his orders, restricting home medications for pain to the fentanyl patch and the one Percocet every 8 hours for acute breakthrough pain.

29. Morrell further violated standards of care and practice protocols by authorizing the discharge of a medically unstable patient following nursing communication to Morrell of a dangerous hypoxemia at 9 a.m. on December 1, 2011.

30. Morrell's failure to report this critical vital sign event to me confirms he was not acting as an agent, representative or employee of NRNS at the time of his care and management of patient Monaco.

31. A NRNS protocol, a copy of which is attached as Exhibit 2, requires all patients at discharge to have oxygen saturation of greater than 90% or to be discharged home on supplemental oxygen.

32. Morrell ignored the critical value of low oxygen vital signs and authorized the discharge of this patient.

33. Regarding the *Consent Judgment-Harley Morrell*, which is attached to the *Memorandum in Support of Joint Motion for Entry of Consent Judgment* [ECF No. 48], I never gave Morrell the authority to bind me or to enter into any agreement on my behalf with the Plaintiffs in this lawsuit.

34. I was not consulted about their agreement.

35. I have not agreed to any of its terms, conclusions, or damages as claimed.

36. I do not join in their agreement.

FURTHER, AFFIANT SAYETH NAUGHT.

John Henry Schneider

STATE OF CALIFORNIA)
) ss.
COUNTY OF SAN BERNARDINO)

On this 2 day of April, 2014, before me Della J Smith Notary Public, personally appeared John Henry Schneider, who proved to be the basis of satisfactory evidence to be the person whose name is subscribed to the within instrument and acknowledged to me that he/she executed the same in his/her authorized capacity, and that by his/her signature on the instrument the person, or the entity on behalf of which the person acted, executed this instrument.

I certify under PENALTY OF PERJURY under the laws of the State of Calif that the foregoing paragraph is true and correct.

WITNESS my hand and official seal.

Notary Public

DELLA J. SMITH
COMM. #1901390
NOTARY PUBLIC - CALIFORNIA
SAN BERNARDINO COUNTY
My Comm. Expires Sep. 23, 2014

(Seal)

My commission expires: Sept 23-2014

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John Schneider, MD @JschneiderMD · 27 Mar 2012
Back in the operating room stamping out disease!

John Schneider, MD @JschneiderMD · 27 Mar 2012
These events are orchestrated by our competitor to undermine our vision. We will prevail and provide expert cost effective care.

John Schneider, MD @JschneiderMD · 27 Mar 2012
Wyoming medical board actions were swift but evidence will show that communication failure from the PAC caused this death and not DR error.

John Schneider, MD @JschneiderMD · 27 Mar 2012
Tragic consequences of a patient death from prescriptions written by a rogue physician assistant employed by me resulted in license issues.

John Schneider, MD @JschneiderMD · 27 Mar 2012
Institutional pressure collaborating with competitor providers are diligent in their campaign to block the independent providers.

John Schneider, MD @JschneiderMD · 27 Mar 2012
We have many institutional detractors working hard to foil our attempts to be successful, hurt our image and prevent our opening.

John Schneider, MD @JschneiderMD · 27 Mar 2012
As a neurosurgeon at OMNI, we are dedicated to expert and complete spine care.

PLAINTIFF'S EXHIBIT 16

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#CiscaQueEuJogoMilho
#MeCambiaElDiaSi
#lamadredeltop
TwitSuvarisi SizdenBiri
Kluber
King Felix
Alaska to Mississippi
Around 54

Jon M. Moyers, Wyo. State Bar #6-3661
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Facsimile: (406) 655-4905
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Telephone: (303) 382-1990
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fpaoli@bogue-paoli.com

Attorneys for Plaintiffs

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF WYOMING

ESTATE OF RUSSELL MONACO, BY AND THROUGH KATHY MONACO, WRONGFUL DEATH REPRESENTATIVE AND PERSONAL REPRESENTATIVE, AND KATHY MONACO, INDIVIDUALLY AND ON BEHALF OF MINOR CHILDREN,	**13-CV-151S**
Plaintiffs,	
vs.	
HARLEY G. MORRELL, PA-C, JOHN SCHNEIDER, JR., M.D., NORTHERN ROCKIES NEURO-SPINE, P.C., a Wyoming Corporation, WEST PARK HOSPITAL DISTRICT, WEST PARK HOSPITAL, QUORUM HEALTH RESOURCES, LLC, a Delaware Corporation, AND JOHN DOES 1 THROUGH 10,	
Defendants.	

JOINT MOTION FOR ENTRY OF CONSENT JUDGMENT

COME NOW Plaintiffs Estate of Russell Monaco, by and through Kathy Monaco, Wrongful Death Representative and Personal Representative, and Kathy Monaco, individually and on behalf of her minor children ("Plaintiffs"), by and through their undersigned counsel of record, Jon M. Moyers, Moyers Law P.C., and Fred Paoli, Bogue & Paoli, LLC, and Defendant Harley Morrell, the former Physician's Assistant of Dr. John Schneider and Northern Rockies Neuro-Spine, P.C., by and through his undersigned attorney of record, Angela Ekker, Lathrop & Gage, and herewith jointly move this Court for an order approving the entry of consent judgment, pursuant to Rules 54 and 58 of the Federal Rules of Civil Procedure. A copy of the consent is attached hereto as Exhibit A; *see* Moyers Affidavit, attached.

In further support, Plaintiffs and Defendant Morrell state:

1. Plaintiffs sued Defendant Morrell and others for medical negligence as a result of the death of Russell Monaco ("Decedent Monaco") on December 2, 2011.

2. Defendant Morrell has acknowledged service of the Summons and Complaint, through his counsel; he has admitted that venue and jurisdiction in this Court are proper.

3. Defendant Morrell admits and confesses liability on the allegations made against him by Plaintiffs in this matter, as alleged in the Complaint. Defendant Morrell admits and confesses that the allegations made by Plaintiffs are true and accurate.

4. Defendant Morrell admits and confesses that his actions were with the express direction, review, verification, acknowledgement, approval, consent and signature of Defendants John H. Schneider, Jr., M.D., and Northern Rockies Neuro-Spine P.C., in the ordinary course and scope of his employment by them.

MOYERS LAW P.C.
490 N. 31st St., Suite 101
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406-655-4905 fax

5. Defendant Morrell admits and confesses that Defendants Schneider, Northern Rockies Neuro-Spine P.C., and West Park Hospital knew and approved the medication prescribed to Decedent Monaco during his hospitalization and upon discharge, were fully apprised of Decedent Monaco's oxygen desaturation, and knew and approved his discharge from the hospital on the prescribed medications without any oxygen monitoring, assistance or supplement.

6. Defendant Morrell admits and confesses that the conduct alleged by Plaintiffs caused or contributed to cause the death of Decedent Monaco.

7. Defendant Morrell admits and confesses that, on the advice of the Wyoming Board of Medicine, as a consequence of Decedent Monaco's death, Defendant Morrell left his employment. On April 12, 2012, after he agreed to the entry of a Consent Decree with the Wyoming Board of Medicine, his Wyoming Physician Assistant License (no. 298) was suspended. Since that time he has not practiced as a Physician's Assistant. A copy of the Consent Decree is attached as Exhibit B and the Finding of Facts is attached as Exhibit C; *see* Moyers Affidavit, attached.

8. In his statement to the Wyoming Board of Medicine, Defendant Morrell accepted responsibility for his role in the events that resulted in the death of Decedent Monaco, as an employee of Defendants Schneider and Northern Rockies Neuro-Spine P.C.

9. Defendant Morrell also made the same admission in his statement to the Wyoming Medical Review Panel. A copy of his answer is attached as Exhibit D; *see* Moyers Affidavit, attached. In his statement to the Wyoming Board of Medicine, Defendant Morrell

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BEFORE THE WYOMING BOARD OF MEDICINE

JAMES A. ANDERSON, M.D., RAY JOHNSON, PA-C, and RICHARD BURTON, R.Ph.	)	
Petitioners,	)	DOCKET NO. 12-11 (formerly Complaint #503)
v.	)	
HARLEY G. MORRELL, PA-C,	)	
Respondent.	)	

CONSENT DECREE

James Anderson, M.D., Ray Johnson, PA-C, and Richard Burton, R.Ph., as members of the Wyoming Board of Medicine and the Physician Assistant Advisory Council, and duly-appointed Petitioners in this matter ("Petitioners"), and Harley G. Morrell, PA-C ("Respondent"), stipulate and agree as follows:

WHEREAS, the Wyoming Board of Medicine ("Board") is the sole and exclusive regulatory and licensing agency in the State of Wyoming regarding the practice of medicine and surgery, as provided in the Wyoming Medical Practice Act, WYO. STAT. ANN. §§ 33-26-101, *et seq.*, ("the Act"); and

WHEREAS, Respondent holds Wyoming Physician Assistant License number 298 which the Board initially issued on October 4, 2002, subjecting him to the jurisdiction of the Board; and

WHEREAS, in accordance with the Board RULES AND REGULATIONS, Ch. 5, § 15(f), Respondent participated in an informal interview with Petitioners, on January 27, 2012; and

WHEREAS, sometime after 2:00 p.m. on November 28, 2011, Respondent assisted his supervising physician in performing spinal surgery on the Patient to address an asserted "neurosurgical emergency." The surgery entailed a junction decompressive lumbar laminectomy at levels L2-3, L3-4, and L4-5, bilateral partial facetectomy and foraminotomy for bilateral nerve decompression and exploration of discogenic deterioration L2-L3, L3-L4, L4-L5. No surgical intervention was performed related to cauda equina syndrome or the reported incontinence.

WHEREAS, the Patient remained in the hospital until December 1, 2011. After the surgery, the Patient experienced moderate pain, which was controlled using various medications. At approximately 8:12 a.m. on Wednesday, November 30, 2011, pursuant to orders written by Respondent and confirmed and verified by Respondent's supervising physician, a Duragesic® fentanyl transdermal patch, 50 MCG/HR, was applied to the Patient's shoulder for asserted control of post-operative pain, in contraindication of "black box" warnings for that medication.

WHEREAS, the prescribing directions for fentanyl transdermal patches contain the following "black box" warning:

> **DURAGESIC® contains a high concentration of a potent Schedule II opioid agonist fentanyl. Schedule II opioid substances which include fentanyl, hydromorphone, methadone, morphine, oxycodone, and oxymorphone have the highest potential for abuse and associated risk of fatal overdose due to respiratory depression. Fentanyl**

can be abused and is subject to criminal diversion. The high content of fentanyl in the patches (DURAGESIC®) may be a particular target for abuse and diversion. DURAGESIC® is indicated for management of persistent, moderate to severe chronic pain that:
• requires continuous, around-the-clock opioid administration for an extended period of time, and
• cannot be managed by other means such as non-steroidal analgesics, opioid combination products, or immediate-release opioids

DURAGESIC® should ONLY be used in patients who are already receiving opioid therapy, who have demonstrated opioid tolerance, and who require a total daily dose at least equivalent to DURAGESIC® 25 mcg/h. Patients who are considered opioid-tolerant are those who have been taking, for a week or longer, at least 60 mg of morphine daily, or at least 30 mg of oral oxycodone daily, or at least 8 mg of oral hydromorphone daily or an equianalgesic dose of another opioid.

Because serious or life-threatening hypoventilation could occur, DURAGESIC® (Fentanyl transdermal system) is contraindicated:
• in patients who are not opioid-tolerant
• in the management of acute pain or in patients who require opioid analgesia for a short period of time
• in the management of post-operative pain, including use after out-patient or day surgeries (e.g., tonsillectomies)
• in the management of mild pain
• in the management of intermittent pain (e.g., use on an as needed basis [prn])

(See CONTRAINDICATIONS for further information.)

[Emphasis in original.]

WHEREAS, Respondent, under the direction, review, verification acknowledgement, approval, consent and/or signature, of his Supervising Physician, has prescribed and utilized fentanyl transdermal patches for post-operative pain in multiple patients in contradiction of the "black box warning" for prescribing that medication for that purpose.

WHEREAS, the Full Prescribing Information for Duragesic® fentanyl transdermal patch system, provides that, "Since the peak fentanyl concentrations generally occur between 20 and 72 hours of treatment, prescribers should be aware that serious or life threatening hypoventilation may occur, even in opioid-tolerant patients, during the initial application period." And, "Duragesic® [is] ONLY [sic] for use in patients who are already tolerant to opioid therapy of comparable potency. Use in non-opioid tolerant patients may lead to fatal respiratory depression. Overestimating the Duragesic® dose when converting patients from another opioid medication can result in fatal overdose with the first dose..." And, "Patients who are considered opioid-tolerant are those who have been taking, for a week or longer, at least 60 mg of morphine daily, or at least 30 mg of oral oxycodone daily, or at least 8 mg of oral hydromorphone daily or an equianalgesic dose of another opioid."

WHEREAS, the Patient was not opioid-tolerant when the fentanyl transdermal system patch was prescribed and applied to him.

WHEREAS, subsequent to the application of the fentanyl patch, the Patient experienced documented low oxygen saturation events. On November 30, 2011, at 1:08 p.m., his oxygen saturation level decreased to 80% while on room air. The

same day at 6:14 p.m., his oxygen saturation level while on three (3) liters of O_2 was 93%. On December 1, 2011, while on two (2) liters of O_2 his saturation level was 94%.

WHEREAS, on December 1, 2011, at approximately 7:50 a.m., Respondent's supervising physician agreed with Respondent on a Progress Note that the Patient's "oxygen stable off NC" [Nasal Cannula].

WHEREAS, at 8:26 a.m., during a "room air challenge," the Patient's oxygen saturation level fell to 75%. The nurse telephoned Respondent's supervising physician's medical office to inform of the oxygen saturation drop. Respondent took a telephone call and informed Respondent's supervising physician, who was sitting in the same room, of the report. Respondent's Supervising Physician directed, approved and/or acknowledged that the Patient be discharged that day as scheduled, and Respondent relayed that direction to the nurse.

WHEREAS, there are no medical records indicating any respiratory therapy counseling or discussion regarding the use of home oxygen upon discharge. Home oxygen was never offered to the Patient at any time by Respondent or Respondent's Supervising Physician.

WHEREAS, at approximately 10:00 a.m. on Thursday, December 1, 2011, the Patient was discharged from WPH by Respondent, under the direction, or with the approval, of his supervising physician. Respondent's Supervising Physician directed, reviewed, verified acknowledged, approved, consented, verified and/or signed prescription orders for several controlled substances: (1) fentanyl patches,

Duragesic®, 50 mcg/Hr (5 additional patches); (2) hydromorphone (Dilaudid), 4 mg; (3) oxycodone, 7.5-325 mg; and (4) diazepam (Valium), 5 mg. Additionally, at the time of discharge, Respondent, under the direction, or with the approval, of his supervising physician, ordered that an intramuscular injection be administered to the Patient consisting of meperidine (Demerol), a pain medication, and promethazine (Phenergan), an anti-nausea medication with depressive effects. All of these controlled substances, individually and/or collectively have identified respiratory side-effects.

WHEREAS, in his response to the Board at an informal interview on January 27, 2012, Respondent confirmed that many of the controlled substances administered and/or prescribed to the Patient, were "usual and customary protocol with all patients" of his Supervising Physician. All Physician Orders related to the Patient's care, including those identifying and prescribing controlled substances, were known, directed, reviewed, verified, acknowledged, approved, consented and/or signed by Respondent's Supervising Physician.

WHEREAS, the Patient returned to his residence in Billings, Montana, by private vehicle at approximately 12 noon, on December 1, 2011. The Patient's spouse obtained the filled prescriptions he received at discharge at a local pharmacy.

WHEREAS, at approximately 2:00 p.m. on December, 1, 2011, the Patient appropriately utilized two (2) Dilaudid tablets as instructed. At approximately 11:00 p.m., the Patient's spouse gave the Patient another Dilaudid tablet in case he

needed it for pain during the night, and left him in their living room while she went to bed.

WHEREAS, at approximately 6:00 a.m. on Friday, December 2, 2011, the Patient's spouse found the Patient unresponsive. Emergency medical services personnel were called and they were unsuccessful in their attempts to revive the Patient. He was declared dead at the scene. The Dilaudid tablet the Patient's spouse left out for the Patient at approximately 11:00 p.m. the night before remained untaken by the Patient.

WHEREAS, the Yellowstone County, Montana, Coroner's Office determined that because of the large quantity of controlled substances found in the Patient's home, along with his recent post-operative status, an autopsy was appropriate.

WHEREAS, the remaining controlled substances that were prescribed upon the Patient's discharge from WPH were secured by law enforcement. The remaining quantities indicate that the Patient appropriately utilized the medications as prescribed.

WHEREAS, at the time of autopsy, a 50 microgram per hour fentanyl patch, with the hand-written notation "MF 11-30-11 0812" was found on the Patient's body. Based on toxicology tests performed on urine and blood samples taken, the Coroner's forensic pathologist found that the Probable Cause of Death was: "Mixed drug overdose (including Oxycodone, Fentanyl, Meperidine, and Diazepam)." All four of these medications were prescribed and/or administered to the Patient pursuant Respondent's orders, which were reviewed, verified and/or signed by Respondent's supervising physician.

WHEREAS, the forensic pathologist further found that, "Toxicology studies through the Montana Forensics Laboratory found significant levels of Oxycodone, Fentanyl, Meperidine and Diazepam, all of which have respiratory depressant effects, the combination sufficient to explain this man's death. In my opinion, this man died as a result of this mixed drug overdose."

WHEREAS, Respondent, under the direction, review, verification acknowledgement, approval, consent and/or signature, of his Supervising Physician, prescribed Duragesic® fentanyl transdermal patches, a Class II controlled substance, for the control of post-operative pain in direct contradiction to the "black box warning" for that medication, placing the Patient at risk for a fatal respiratory event;

WHEREAS, Respondent, under the direction, review, verification acknowledgement, approval, consent and/or signature, of his Supervising Physician, has utilized Duragesic® fentanyl transdermal patches, on multiple occasions to treat patients post-operatively for pain, in direct contradiction of the "black box warning" for prescribing that medication,;

WHEREAS, Respondent, under the direction, review, verification acknowledgement, approval, consent and/or signature, of his Supervising Physician, prescribed and treated the Patient with Duragesic® fentanyl transdermal patches, for post-operative pain, in direct contradiction to the prescribing information literature, when the Patient was not opioid-tolerant;

WHEREAS, the controlled substances, combinations and/or amounts of thereof, administered, ordered and/or prescribed to the Patient upon his discharge

from WPH by Respondent placed the Patient at high risk for a fatal respiratory event;

WHEREAS, Respondent, under the direction, review, verification acknowledgement, approval, consent and/or signature, of his Supervising Physician, allowed that the Patient be discharged from WPH without adequate provisions to monitor and protect his oxygen status, despite recent and known hypoxic events during his hospital stay. There is no indication in the medical records that the Patient was ever offered or counseled regarding the use of home oxygen;

WHEREAS, based upon the above-recited facts, Petitioners believed that the public health, safety and welfare required that a formal Petition be filed and action be taken against Respondent's Physician Assistant License.

NOW THEREFORE, in lieu of proceeding on the previously filed Petition, including proceeding to a contested case hearing in this disciplinary case at which the Board could enter sanctions against Respondent's Physician Assistant License, Respondent hereby agrees and consents as follows:

1. Respondent admits that the Board of Medicine is a duly-authorized administrative agency of the State of Wyoming with the appropriate statutory authority to regulate the practice of medicine and surgery in the State of Wyoming; that this Consent Decree and the filing of such documents are in accordance with the requirements of law; that the Board of Medicine is lawfully constituted to consider this matter; that the Respondent does not challenge the constitutionality of the Wyoming Medical Practice Act, WYO. STAT. ANN. §§ 33-26-101, *et seq.*; that

the Board of Medicine in acting in this matter is not acting beyond the jurisdiction conferred to it by any provision of law; and, under the provisions of the Board of Medicine's duly-adopted RULES OF PRACTICE AND PROCEDURE FOR DISCIPLINARY COMPLAINTS AGAINST PHYSICIANS, Chapter 5, Section 15(h), the Board of Medicine has authority to enter into this Consent Decree.

2. Respondent agrees that the conduct at issue in this Docket No. 12-11, would, if proven true, constitute grounds for disciplinary action under WYO. STAT. ANN. § 33-26-402(a)(xxii) and (xxvii)(B), (C), (D);

3. In lieu of proceeding further with the Petition, Docket No. 12-11, including evidence being presented to the Board in a contested case hearing as provided for in the Wyoming Medical Practice Act and Wyoming Administrative Procedure Act, Respondent in signing this Consent Decree agrees to abide by the following terms and conditions:

a. Respondent's Wyoming Physician Assistant License shall be revoked; however, the revocation shall be stayed indefinitely pending the investigation into, and any Board action involving the medical care provided to the Patient by, or under the supervision of, Respondent's Supervising Physician.

b. If Respondent allows his Wyoming Physician Assistant License to lapse during the period that the revocation is stayed, the License shall be lapsed in a status of stayed revocation.

c. If Respondent at a future date requests reactivation of his lapsed Physician Assistant License, it shall be reinstated to a status of stayed revocation.

d. During the period the revocation is stayed, Respondent shall continue to properly and timely renew his Physician Assistant License.

e. During the period the revocation is stayed, Respondent shall comply with all state and federal laws, rules and regulations pertaining to practice as a physician assistant.

f. No later than three (3) months after the entry of a final order or other final resolution of the investigation into, and any Board action involving the medical care provided to the Patient by, or under the supervision of, Respondent's Supervising Physician, the Board shall determine whether to lift the stay of revocation of Respondent's Physician Assistant License or take such other action as it deems appropriate in the circumstances.

4. Respondent agrees to comply with all provisions, terms and conditions set forth in Paragraph 3 of this Consent Decree at all times.

5. Respondent agrees that the Petitioners and Board, in acting in this matter, are not acting beyond the jurisdiction conferred by any provision of law or by the Board's duly adopted RULES AND REGULATIONS.

6. This Consent Decree, once approved by the Board, is a final order pursuant to WYO. STAT. ANN. § 33-26-408(c) and as such shall be reported to the Federation of State Medical Boards and to the National Practitioner Data Bank pursuant to the Health Care Quality Improvement Act of 1986, Title IV of Public Law 99-660, as amended, and Federal Regulations at 45 CFR Part 60. The Consent Decree shall also be reportable as provided in Chapter 4, Section 9 and Chapter 6, Section 3 of the Board's RULES AND REGULATIONS.

7. Respondent acknowledges that he has had the ability to confer with legal counsel regarding this Consent Decree if so desired; that he understands each of the terms and that he is entering into this Consent Decree freely and voluntarily.

8. This Consent Decree constitutes the entire agreement between the Petitioners and the Respondent; there are no other agreements or understandings between them which are not set forth herein; and this Consent Decree may not be modified or amended, except by a writing executed by all parties hereto and approved by Board order.

9. Respondent acknowledges that this Consent Decree will have no legal effect unless and until the Board approves its contents. If the Board does not approve this Consent Decree, and the matter proceeds to a contested case hearing, Respondent agrees he will not assert Board consideration of the Consent Decree as grounds to assert bias, prejudice, prejudgment and/or similar defenses at any subsequent contested case hearing.

10. If the terms and conditions of this Consent Decree are approved by the Board, the effective date of this Consent Decree shall be the date on which the Board enters it order hereon.

11. Pursuant to WYO. STAT. ANN. § 33-26-406(a), Respondent may petition the Board beginning six (6) months after the effective date of this Consent Decree, that is the date of the Board order approving it, for removal of any restrictions and/or conditions placed upon his Physician Assistant License hereby. Removal of any restrictions and/or conditions placed upon his Physician Assistant License hereby, requested via petition, shall be within the Board's sole discretion.

Respondent shall be responsible, in an amount ordered by the Board, for payment of any fees and costs expended by the Board related to any petition filed by Respondent seeking removal of any restrictions and/or conditions placed upon his Physician Assistant License hereby. Those fees and costs shall be determined by the Board and may be assessed whether or not Respondent withdraws any petition prior to determination by the Board.

IN WITNESS HEREOF, the following have executed this Consent Decree on the date shown.

Harley G. Morrell, PA-C
Respondent

4/4/12
Date

James Anderson, M.D.
Petitioner

4-12-12
Date

Ray Johnson, PA-C
Petitioner

4-12-12
Date

Richard Burton, R.Ph.
Petitioner

Date

Bill G. Hibbler, No. 5-2178
Special Assistant Attorney General
Board Prosecutor

4/12/12
Date

Respondent shall be responsible, in an amount ordered by the Board, for payment of any fees and costs expended by the Board related to any petition filed by Respondent seeking removal of any restrictions and/or conditions placed upon his Physician Assistant License hereby. Those fees and costs shall be determined by the Board and may be assessed whether or not Respondent withdraws any petition prior to determination by the Board.

IN WITNESS HEREOF, the following have executed this Consent Decree on the date shown.

Harley G. Morrell, PA-C
Respondent — Date: 4/4/12

James Anderson, M.D.
Petitioner — Date

Ray Johnson, PA-C
Petitioner — Date

Richard Burton, R.Ph.
Petitioner — Date: 4-9-2012

Bill G. Hibbler, No. 5-2178
Special Assistant Attorney General
Board Prosecutor — Date

BEFORE THE WYOMING BOARD OF MEDICINE

FILED

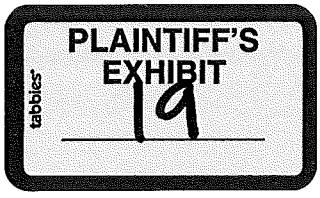
MAR 12 2014

Wyoming Board of Medicine

DAVID SKOLNICK, D.O., and MS. CISSY DILLON,	)	
Petitioners,	)	Docket No. 12-08
vs.	)	OAH Docket No. 12-110-052
JOHN H. SCHNEIDER, JR., M.D.,	)	
Respondent.	)	

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER REVOKING THE WYOMING MEDICAL LICENSE OF JOHN H. SCHNEIDER, JR., M.D., WYOMING PHYSICIAN'S LICENSE NO. 5973A, AND IMPOSING A CIVIL FINE AND ASSESSING COSTS

THIS MATTER having come before a hearing panel and quorum of the Wyoming Board of Medicine (Board) consisting of Michael Jording, M.D.; Ms. Jody McGill; Kristina Stefka, M.D.; Jeffrey Storey, M.D.; and Donald Tardif, PA-C, at a Board meeting on January 24, 2014, for the conclusion of a contested case hearing upon a COMPLAINT AND PETITION filed by David Skolnick, D.O., and Cissy Dillon (Petitioners) against John H. Schneider, Jr., M.D. (Respondent), alleging multiple violations of the Wyoming Medical Practice Act, WYO. STAT. ANN. §§ 33-26-101 through -601. The Petitioners were represented by Bill G. Hibbler, Esq., Special Assistant Attorney General, Board Prosecutor; and Respondent was represented by Stephen H. Kline, Esq., and Stephenson D. Emery, Esq. The hearing was conducted by Deborah Baumer, Esq.



417. The Board finds that the applicable standard of care dictates that the fentanyl patch should not have been administered under the circumstances of this case. Dr. Schwarz's and Dr. Kulig's expert medical opinions established the applicable standard of care for prescribing the fentanyl patch and refuted the standard of care offered by Respondent.

418. The Board finds and concludes that Respondent practiced below that standard of care by prescribing the fentanyl patch in this case, or failing to countermand a prescription for the fentanyl patch entered by the physician assistant under his direct supervision.

419. The Board finds that Respondent practiced below the applicable standard of care by failing to properly assess Mr. Doe's hypoxia. The evidence presented established that: Mr. Doe was morbidly obese; Mr. Doe was prescribed high doses of multiple narcotic medications to allow mobilization; Mr. Doe's oxygen saturations levels dropped to 80% or below on room air; and Respondent suspected that Mr. Doe had sleep apnea.

420. The Board finds, that in the circumstances of this case, the applicable standard of care dictates that Mr. Doe undergo inpatient pulmonology consultation and prompt reversal of the discharge order. Dr. Schwarz's expert medical opinion established the applicable standard of care for evaluating hypoxia and refuted the standard of care offered by Respondent. The Board finds that Respondent practiced below that standard of care by failing to properly assess Mr. Doe's hypoxia.

[REMAINDER OF THIS PAGE INTENTIONALLY LEFT BLANK.]

ORDER

IT IS HEREBY ORDERED, based upon the foregoing FINDINGS OF FACT AND CONCLUSIONS OF LAW, that Respondent's Wyoming Physician's License No. 5973A is **REVOKED**.

IT IS FURTHER ORDERED that Respondent shall pay all the costs of the proceeding against Respondent in the total amount of $124,431.39 to be paid within 30 days of the effective date of this ORDER.

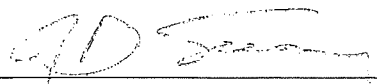
IT IS FURTHER ORDERED that a civil fine of twenty-five thousand dollars ($25,000.00) shall be imposed upon Respondent, to be paid within 30 days of the effective date of this ORDER.

IT IS FURTHER ORDERED that this ORDER shall constitute a final order of the Board. Additionally, this ORDER is a public document.

IT IS FURTHER ORDERED that Respondent shall have 30 days after service of this ORDER to appeal.

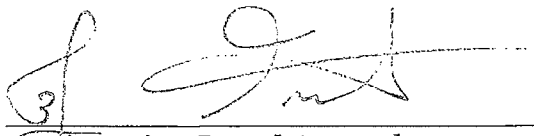
DATED this 12th day of March, 2014

FOR THE BOARD:



Jeffrey Storey, M.D., President

APPROVED AS TO FORM:



Jessica Frint, Board Counsel
Assistant Attorney General